UNITED STATES REPORTS

VOLUME 492

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1988

JUNE 23 THROUGH SEPTEMBER 28, 1989

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATA

490 U. S. 72, line 23: "942" should be "941".
490 U. S. 650, line 3: "1264" should be "1232".
490 U. S. 652, line 5 from bottom: "922–994" should be "992–994".
490 U. S. 862, last text line: "838" should be "1003".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.

RETIRED

WARREN E. BURGER, Chief Justice.
LEWIS F. POWELL, Jr., Associate Justice.

OFFICERS OF THE COURT

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KENNETH W. STARR, Solicitor General.
JOSEPH F. SPANIOL, Jr., Clerk.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective February 18, 1988, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, ANTONIN SCALIA, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

February 18, 1988.

(For next previous allotment, and modifications, see 479 U. S., p. V, 483 U. S., pp. V, VI, and 484 U. S., pp. V, VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1988

MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* GIARRATANO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88–411. Argued March 22, 1989—Decided June 23, 1989

Respondents, a class of indigent Virginia death row inmates who do not have counsel to pursue postconviction proceedings, brought a suit under 42 U. S. C. § 1983 in the District Court against various state officials, alleging that the Constitution required that they be provided with counsel at the State's expense for the purpose of pursuing collateral proceedings related to their convictions and sentences. The District Court concluded that respondents should receive greater assistance than that outlined in *Bounds* v. *Smith*, 430 U. S. 817—which held that a prisoner's "right of access" to the courts required a State to furnish access to adequate law libraries or other legal aid so the prisoners might prepare petitions for judicial relief—since death row inmates have a limited amount of time to prepare petitions, since their cases are unusually complex, and since the shadow of impending execution interferes with their ability to do legal work. It found that Virginia's efforts—access to a law library or lawbooks, the availability of "unit attorneys," and appointment of counsel after a petition is filed—did not afford prisoners meaningful access to the courts because they did not guarantee the prisoners continuous assistance of counsel. Thus, it ordered Virginia to develop a program for the appointment of counsel, upon request, to indigent death row inmates wishing to pursue habeas corpus in state court, but, in light of *Ross* v. *Moffitt*, 417 U. S. 600, not in federal court. The Court of Appeals affirmed. It viewed the lower court's special "considerations"

relating to death row inmates as findings of fact which were not clearly erroneous. It reasoned that the case was not controlled by *Pennsylvania* v. *Finley*, 481 U. S. 551—which held that neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of "meaningful access" required the State to appoint counsel for indigent prisoners seeking postconviction relief—since *Finley* was not a "meaningful access" case, since it did not address the rule enunciated in *Bounds*, and since it did not involve the death penalty.

Held: The judgment is reversed, and the case is remanded.

847 F. 2d 1118, reversed and remanded.

THE CHIEF JUSTICE, joined by JUSTICE WHITE, JUSTICE O'CONNOR, and JUSTICE SCALIA, concluded that neither the Eighth Amendment nor the Due Process Clause requires States to appoint counsel for indigent death row inmates seeking state postconviction relief. Pp. 7–13.

(a) This Court's decisions require the conclusion that the rule of *Pennsylvania* v. *Finley* should apply no differently in capital cases than in noncapital cases. See, *e. g.*, *Smith* v. *Murray*, 477 U. S. 527. State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceeding and serve a different and more limited purpose than either the trial or appeal. Eighth Amendment safeguards imposed at the trial stage—where the court and jury hear testimony, receive evidence, and decide the question of guilt and punishment—are sufficient to assure the reliability of the process by which the death penalty is imposed. Pp. 7–10.

(b) There is no inconsistency whatever between the holdings in *Bounds* and *Finley*. The right of access at issue in *Bounds* rests on a constitutional theory considered in *Finley*. Extending *Bounds* would partially overrule the subsequently decided *Finley* and would reject a categorical rule—the usual tack taken in right to counsel cases—for the adoption of a case-by-case determination based on "factual" findings, which, under a "clearly-erroneous" standard, could result in different constitutional rules being applied in different States. Pp. 10–13.

JUSTICE KENNEDY, joined by JUSTICE O'CONNOR, concluded that Virginia's scheme for securing representation for indigent death row inmates does not violate the Constitution. Although Virginia's procedures are not as far reaching and effective as those available in other States, no Virginia death row inmates have been unable to obtain counsel to represent them in postconviction proceedings, and Virginia's prison system is staffed by institutional lawyers to assist inmates in such matters. *Bounds*' meaningful-access requirement can be satisfied in various ways, and state legislatures and prison administrators must be

given "wide discretion" to select appropriate solutions from a range of complex options. Pp. 14–15.

REHNQUIST, C. J., announced the judgment of the Court and delivered an opinion, in which WHITE, O'CONNOR, and SCALIA, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 13. KENNEDY, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. 14. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 15.

Robert Q. Harris, Assistant Attorney General of Virginia, argued the cause for petitioners. With him on the briefs were *Mary Sue Terry*, Attorney General, *H. Lane Kneedler*, Chief Deputy Attorney General, *Stephen D. Rosenthal*, Deputy Attorney General, and *Francis S. Ferguson*, Assistant Attorney General.

Gerald T. Zerkin argued the cause for respondents. With him on the brief were *Jonathan D. Sasser* and *Martha A. Geer.**

CHIEF JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which JUSTICE WHITE, JUSTICE O'CONNOR, and JUSTICE SCALIA join.

Virginia death row inmates brought a civil rights suit against various officials of the Commonwealth of Virginia. The prisoners claimed, based on several theories, that the Constitution required that they be provided with counsel at the Commonwealth's expense for the purpose of pursuing collateral proceedings related to their convictions and sentences. The courts below ruled that appointment of counsel upon request was necessary for the prisoners to enjoy their

*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Elizabeth Alexander*, *Alvin J. Bronstein*, *Steven R. Shapiro*, and *John A. Powell;* for the Maryland State Bar Association et al. by *John H. Blume;* and for the National Legal Aid & Defender Association et al. by *Ephraim Margolin* and *Steven M. Pesner.*

Robert D. Raven, *Ronald J. Tabak*, *George H. Kendall*, and *Clifford D. Stromberg* filed a brief for the American Bar Association as *amicus curiae.*

constitutional right to access to the courts in pursuit of state habeas corpus relief. We think this holding is inconsistent with our decision two Terms ago in *Pennsylvania* v. *Finley*, 481 U. S. 551 (1987), and rests on a misreading of our decision in *Bounds* v. *Smith*, 430 U. S. 817 (1977).

Joseph M. Giarratano is a Virginia prisoner under a sentence of death. He initiated this action under 42 U. S. C. § 1983, by *pro se* complaint in Federal District Court, against various state officials including Edward W. Murray who is the Director of the Virginia Department of Corrections. Some months later, the District Court certified a class comprising all current and future Virginia inmates awaiting execution who do not have and cannot afford counsel to pursue postconviction proceedings.[1] The inmates asserted a number of constitutional theories for an entitlement to appointed counsel and the case was tried to the court.

After the evidence, post-trial briefs, and other memoranda, the District Court expressed "serious doubts as to the viability of many of th[e] theories." 668 F. Supp. 511, 512 (ED Va. 1986). It was, however, "satisfied that the United States Supreme Court's decision in *Bounds* dictates that the plaintiffs here be granted some form of relief." *Ibid.* The District Court noted three special "considerations" relating to death row inmates that it believed required that these inmates receive greater assistance than *Bounds* had outlined. It found that death row inmates had a limited amount of time to prepare their petitions, that their cases were unusually complex, and that the shadow of impending execution would interfere with their ability to do legal work. These "consid-

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[1] In precise terms, the class was defined as

"all persons, now and in the future, sentenced to death in Virginia, whose sentences have been or are subsequently affirmed by the Virginia Supreme Court and who either (1) cannot afford to retain and do not have attorneys to represent them in connection with their post-conviction proceedings, or (2) could not afford to retain and did not have attorneys to represent them in connection with a particular post-conviction proceeding." App. 32.

erations" led the court to believe that the "plaintiffs are incapable of effectively using lawbooks to raise their claims." As a result, it found that Virginia's policy of either allowing death row inmates time in the prison law library or permitting them to have lawbooks sent to their cells did "little to satisfy Virginia's obligation."[2] 668 F. Supp., at 513. "Virginia must fulfill its duty by providing these inmates trained legal assistance." *Ibid.*

The District Court then evaluated the avenues by which inmates convicted of capital crimes could obtain the aid of counsel in Virginia. It found inadequate the availability of "unit attorneys" appointed by Virginia to the various penal institutions to assist inmates in incarcertion-related litigation. *Id.*, at 514. Further, it found that "[e]ven if Virginia appointed additional institutional attorneys to service death row inmates, its duty under *Bounds* would not be fulfilled" because, acting "only as legal advisors," "[t]he scope of assistance these attorneys provide is simply too limited." *Ibid.* Along the same lines, the District Court concluded that Virginia's provisions for appointment of counsel after a petition is filed did not cure the problem.[3] This was primarily because "the

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[2] Virginia houses its death row inmates at the Mecklenberg Correctional Center, the Virginia State Penitentiary, and the Powhatan Correctional Center. Each of these three centers maintain law libraries. Inmates at Mecklenberg are allowed two library periods per week; inmates at the other facilities may borrow materials from the prison library for use in their cells.

[3] At the time the District Court decided the case, Virginia courts were authorized to appoint counsel to individual inmates as follows:

"Any person, who has been a resident of this State for a continuous period of six months, who on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefore, except what may be included in the costs recovered from the opposite party." Va. Code § 14.1–183 (1950).

The Virginia Code was amended in 1987 to delete the 6-month residency requirement. Va. Code § 14.1–183 (Supp. 1988). It is unclear whether,

timing of the appointment is a fatal defect" as the inmate "would not receive the attorney's assistance in the critical stages of developing his claims." *Id.*, at 515.

Even together, Virginia's efforts did not afford prisoners a meaningful right of access to the courts, in the opinion of the District Court, because they did not guarantee them "the continuous assistance of counsel." *Ibid.* With what the District Court feared was the imminent depletion of the pool of volunteer attorneys willing to help Virginia death row inmates attack their convictions and sentences, the court felt that "[t]he stakes are simply too high for this Court not to grant, at least in part, some relief." It therefore ordered Virginia to develop a program for the appointment of counsel, upon request, to indigent death row inmates wishing to pursue habeas corpus in state court. *Id.*, at 517. It decided, however, that the decision in *Ross* v. *Moffitt*, 417 U. S. 600 (1974), indicated that Virginia had no similar constitutional obligation to appoint counsel for the pursuit of habeas corpus in federal court. 668 F. Supp., at 516–517.

On appeal to the United States Court of Appeals for the Fourth Circuit, a divided panel reversed the District Court's judgment that the Commonwealth was constitutionally required to provide personal attorneys to represent death row inmates in state collateral proceedings. 836 F. 2d 1421 (1988). But that court, en banc, subsequently reheard the case and affirmed the District Court. 847 F. 2d 1118 (1988). The en banc court viewed as findings of fact the special "considerations" relating to death row inmates which had led the District Court to conclude that Virginia was not in compliance with the constitutional rights of access. It accepted these findings as not clearly erroneous and so affirmed the the District Court's remedial order. The en banc court did not believe the case to be controlled by *Pennsylvania* v.

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in review of capital cases, counsel will be appointed under this statute or otherwise prior to filing and unless the petition presents a nonfrivolous claim. See *Darnell* v. *Peyton*, 208 Va. 675, 160 S. E. 2d 749 (1968).

Finley, 481 U. S. 551 (1987), which held that the Constitution did not require States to provide counsel in postconviction proceedings. "*Finley* was not a meaningful access case, nor did it address the rule enunciated in *Bounds* v. *Smith*." 847 F. 2d, at 1122. "Most significantly," thought the Fourth Circuit, "*Finley* did not involve the death penalty." *Ibid.* Four judges dissented. We granted certiorari, 488 U. S. 923 (1988), and now reverse.

In *Finley* we ruled that neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of "meaningful access" required the State to appoint counsel for indigent prisoners seeking state postconviction relief. The Sixth and Fourteenth Amendments to the Constitution assure the right of an indigent defendant to counsel at the trial stage of a criminal proceeding, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and an indigent defendant is similarly entitled as a matter of right to counsel for an initial appeal from the judgment and sentence of the trial court. *Douglas* v. *California*, 372 U. S. 353 (1963); *Griffin* v. *Illinois*, 351 U. S. 12 (1956). But we held in *Ross* v. *Moffitt*, *supra*, at 610, that the right to counsel at these earlier stages of a criminal procedure did not carry over to a discretionary appeal provided by North Carolina law from the intermediate appellate court to the Supreme Court of North Carolina. We contrasted the trial stage of a criminal proceeding, where the State by presenting witnesses and arguing to a jury attempts to strip from the defendant the presumption of innocence and convict him of a crime, with the appellate stage of such a proceeding, where the defendant needs an attorney "not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt." 417 U. S., at 610–611.

We held in *Finley* that the logic of *Ross* v. *Moffitt* required the conclusion that there was no federal constitutional right

to counsel for indigent prisoners seeking state postconviction relief:

> "Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. See *Fay* v. *Noia*, 372 U. S. 391, 423–424 (1963). . . . States have no obligation to provide this avenue of relief, cf. *United States* v. *MacCollom*, 426 U. S. 317, 323 (1976) (plurality opinion), and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the state supply a lawyer as well." 481 U. S., at 556–557.

Respondents, like the courts below, believe that *Finley* does not dispose of respondents' constitutional claim to appointed counsel in habeas proceedings because *Finley* did not involve the death penalty.[4] They argue that, under the Eighth Amendment, "evolving standards of decency" do not permit a death sentence to be carried out while a prisoner is unrepresented. Brief for Respondents 47. In the same vein, they contend that due process requires appointed counsel in postconviction proceedings, because of the nature of the punishment and the need for accuracy. *Id.*, at 48–49.

We have recognized on more than one occasion that the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death. See, *e. g.*, *Beck* v. *Alabama*, 447 U. S. 625 (1980) (trial judge must give jury the option to convict of a lesser offense); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (jury must be allowed to consider all of a capital defendant's mitigating character evidence); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982) (same). The finality of the death penalty re-

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[4] Respondents offer this theory—that the Constitution requires postconviction cases involving the death penalty to be treated differently from other postconviction cases—as a basis for affirmance in addition to their reliance on *Bounds* v. *Smith*, 430 U. S. 817 (1977), discussed later.

quires "a greater degree of reliability" when it is imposed. *Lockett, supra,* at 604.

These holdings, however, have dealt with the trial stage of capital offense adjudication, where the court and jury hear testimony, receive evidence, and decide the questions of guilt and punishment. In *Pulley* v. *Harris,* 465 U. S. 37 (1984), we declined to hold that the Eighth Amendment required appellate courts to perform proportionality review of death sentences. And in *Satterwhite* v. *Texas,* 486 U. S. 249, 256 (1988), we applied the traditional appellate standard of harmless-error review set out in *Chapman* v. *California,* 386 U. S. 18 (1967), when reviewing a claim of constitutional error in a capital case.

We have similarly refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus. In *Smith* v. *Murray,* 477 U. S. 527, 538 (1986), a case involving federal habeas corpus, this Court unequivocally rejected "the suggestion that the principles [governing procedural fault] of *Wainwright* v. *Sykes*[, 433 U. S. 72 (1977),] apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws" and similarly discarded the idea that "there is anything 'fundamentally unfair' about enforcing procedural default rules . . . ." *Id.,* at 538–539. And, in *Barefoot* v. *Estelle,* 463 U. S. 880, 887 (1983), we observed that "direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception."

Finally, in *Ford* v. *Wainwright,* 477 U. S. 399 (1986), we held that the Eighth Amendment prohibited the State from executing a validly convicted and sentenced prisoner who was insane at the time of his scheduled execution. Five Justices of this Court, however, rejected the proposition that "the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." *Id.,* at 411–412. Justice Powell recognized that the prison-

er's sanity at the time of execution was "not comparable to the antecedent question of whether the petitioner should be executed at all." *Id.*, at 425. "It follows that this Court's decisions imposing heightened procedural requirements on capital trials and sentencing proceedings do not apply in this context." *Ibid.* (citations omitted); *id.*, at 429 (O'CONNOR, J., joined by WHITE, J., dissenting in part and concurring in result in part) (due process requirements minimal); *id.*, at 434 (REHNQUIST, J., joined by Burger, C. J., dissenting) (wholly executive procedures sufficient).

We think that these cases require the conclusion that the rule of *Pennsylvania* v. *Finley* should apply no differently in capital cases than in noncapital cases. State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal.[5] The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed. We therefore decline to read either the Eighth Amendment or the Due Process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases.

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[5] The dissent offers surveys to show that Virginia is one of a handful of States without a "system for appointing counsel for condemned prisoners before a postconviction petition is filed." *Post*, at 31. But even these surveys indicate that only 18 of the 37 States make such appointment automatic. *Post*, at 30. These 18 States overlap to a significant extent with the 13 States that have created "resource centers to assist counsel in litigating capital cases," *post*, at 30–31, which, in any event, is not the same thing as requiring automatic appointment of counsel before the filing of a petition. Consequently, a substantial balance of States do not accord the right that the dissent would require Virginia to grant as a matter of constitutional law. Virginia courts presently have the authority to appoint counsel to represent any inmate in state habeas proceedings, Va. Code § 14.1–183 (Supp. 1988), and the attorney general represents that such appointments have been made, upon request, before the filing of any petition. Brief for Petitioners 6–7.

The dissent opines that the rule that it would constitutionally mandate "would result in a net benefit to Virginia." *Post*, at 30. But this "mother knows best" approach should play no part in traditional constitutional adjudication. Even as a matter of policy, the correctness of the dissent's view is by no means self-evident. If, as we said in *Barefoot* v. *Estelle*, *supra*, direct appeal is the primary avenue for review of capital cases as well as other sentences, Virginia may quite sensibly decide to concentrate the resources it devotes to providing attorneys for capital defendants at the trial and appellate stages of a capital proceeding. Capable lawyering there would mean fewer colorable claims of ineffective assistance of counsel to be litigated on collateral attack.

The Court of Appeals, as an additional basis for its holding, relied on what it perceived as a tension between the rule in *Finley* and the implication of our decision in *Bounds* v. *Smith*, 430 U. S. 817 (1977); we find no such tension. Whether the right of access at issue in *Bounds* is primarily one of due process or equal protection,[6] in either case it rests on a constitutional theory considered in *Finley*. The Court held in *Bounds* that a prisoner's "right of access" to the courts required a State to furnish access to adequate law libraries in order that the prisoners might prepare petitions for judicial relief. *Bounds*, *supra*, at 828. But it would be a strange jurisprudence that permitted the extension of that holding to partially overrule a subsequently decided case such as *Finley* which held that prisoners seeking judicial relief from their sentence in state proceedings were not entitled to counsel.

It would be an even stranger jurisprudence to allow, as the dissent would, the "right of access" involved in *Bounds* v. *Smith*, *supra*, to partially overrule *Pennsylvania* v. *Finley*,

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[6]The prisoner's right of access has been described as a consequence of the right to due process of law, see *Procunier* v. *Martinez*, 416 U. S. 396, 419 (1974), and as an aspect of equal protection, see *Pennsylvania* v. *Finley*, 481 U. S. 551, 557 (1987).

based on "factual" findings of a particular district court regarding matters such as the perceived difficulty of capital sentencing law and the general psychology of death row inmates. Treating such matters as "factual findings," presumably subject only to review under the "clearly-erroneous" standard, would permit a different constitutional rule to apply in a different State if the district judge hearing that claim reached different conclusions. Our cases involving the right to counsel have never taken this tack; they have been categorical holdings as to what the Constitution requires with respect to a particular stage of a criminal proceeding in general. See *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Griffin* v. *Illinois*, 351 U. S. 12 (1956); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Douglas* v. *California*, 372 U. S. 353 (1963); *Ross* v. *Moffitt*, 417 U. S. 600 (1974); *Pennsylvania* v. *Finley*, 481 U. S. 551 (1987). Indeed, as the dissent itself points out, *post*, at 17, and n. 2, it was the Court's dissatisfaction with the case-by-case approach of *Betts* v. *Brady*, 316 U. S. 455 (1942), that led to the adoption of the categorical rule requiring appointed counsel for indigent felony defendants in *Gideon*.

There is no inconsistency whatever between the holding of *Bounds* and the holding in *Finley;* the holding of neither case squarely decides the question presented in this case. For the reasons previously stated in this opinion, we now hold that *Finley* applies to those inmates under sentence of death as well as to other inmates, and that holding necessarily imposes limits on *Bounds*.[7]

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[7] Many States automatically provide counsel to death row inmates in state habeas corpus proceedings, as a matter of state law. See, *e. g.*, Ariz. Rule Crim. Proc. 32.5(b); Conn. Gen. Stat. § 51–296(a) (1985); Okla. Stat., Tit. 22, § 1089 (Supp. 1988); Ore. Rev. Stat. § 138.590(3) (1987). Under the Anti-Drug Abuse Act of 1988, attorneys will be appointed in federal habeas corpus actions involving a challenge to a death sentence. See § 7001(b), Pub. L. 100–690, 102 Stat. 4393, 21 U. S. C. § 848(q)(4)(B) (1988 ed.). Respondents suggest that appointment of counsel might even benefit Virginia by speeding, or at least clarifying, the Virginia postconviction process. The situation of death row inmates may well be the basis for

Petitioners and respondents disagree as to the practices currently in effect in Virginia state prisons with respect to death row prisoners. Respondents contend that these prisoners are denied adequate and timely access to a law library during the final weeks before the date set for their execution. If respondents are correct, the District Court on remand may remedy this situation without any need to enlarge the holding of *Bounds*.

The judgment of the Court of Appeals is

Reversed.

JUSTICE O'CONNOR concurring.

I join in THE CHIEF JUSTICE's opinion. As his opinion demonstrates, there is nothing in the Constitution or the precedents of this Court that requires that a State provide counsel in postconviction proceedings. A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings, see *Pennsylvania* v. *Finley*, 481 U. S. 551 (1987), nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings. I also join in JUSTICE KENNEDY's opinion concurring in the judgment, since I do not view it as inconsistent with the principles expressed above. As JUSTICE KENNEDY observes, our decision in *Bounds* v. *Smith*, 430 U. S. 817 (1977), allows the States considerable discretion in assuring that those imprisoned in their jails obtain meaningful access to the judicial process. Beyond the requirements of *Bounds*, the matter is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources. Our decision today rightly leaves these issues to resolution by Congress and the state legislatures.

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state policy to provide them extra legal assistance or more lenient standards of *pro se* pleading.

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death. As JUSTICE STEVENS observes, a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings. *Post*, at 23–24, and n. 13. The complexity of our jurisprudence in this area, moreover, makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.

The requirement of meaningful access can be satisfied in various ways, however. This was made explicit in our decision in *Bounds* v. *Smith*, 430 U. S. 817 (1977). The intricacies and range of options are of sufficient complexity that state legislatures and prison administrators must be given "wide discretion" to select appropriate solutions. *Id.*, at 833. Indeed, judicial imposition of a categorical remedy such as that adopted by the court below might pretermit other responsible solutions being considered in Congress and state legislatures. Assessments of the difficulties presented by collateral litigation in capital cases are now being conducted by committees of the American Bar Association and the Judicial Conference of the United States, and Congress has stated its intention to give the matter serious consideration. See 134 Cong. Rec. 33237 (1988) (providing for expedited consideration of proposals of the Judicial Conference committee).

Unlike Congress, this Court lacks the capacity to undertake the searching and comprehensive review called for in this area, for we can decide only the case before us. While Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with in-

stitutional lawyers to assist in preparing petitions for postconviction relief. I am not prepared to say that this scheme violates the Constitution.

On the facts and record of this case, I concur in the judgment of the Court.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

Two Terms ago this Court reaffirmed that the Fourteenth Amendment to the Federal Constitution obligates a State "'to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.'" *Pennsylvania* v. *Finley*, 481 U. S. 551, 556 (1987) (quoting *Ross* v. *Moffitt*, 417 U. S. 600, 616 (1974)). The narrow question presented is whether that obligation includes appointment of counsel for indigent death row inmates who wish to pursue state postconviction relief. Viewing the facts in light of our precedents, we should answer that question in the affirmative.

I

The parties before us, like the Court of Appeals en banc and the District Court below, have accorded controlling importance to our decision in *Bounds* v. *Smith*, 430 U. S. 817 (1977).[1] In that case, inmates had alleged that North Caro-

[1] Compare Brief for Petitioners 23 ("The notion that the access right is to be measured against the assistance that might be provided an inmate by a personal lawyer has no support in *Bounds*. Indeed, the idea is entirely inconsistent with the limited nature of the right") with Brief for Respondents 25 ("The district court's findings, conclusion, and remedy all comprise a conventional application of *Bounds* in an extraordinary context").

Although the Court of Appeals en banc and the District Court placed singular reliance on *Bounds*, both indicated that they would have reached the same result on the other legal theories as well. 847 F. 2d 1118, 1122, n. 8 (CA4 1988) ("Because of the peculiar nature of the death penalty, we find it difficult to envision any situation in which appointed counsel would not be required in state post-conviction proceedings when a prisoner under the sentence of death could not afford an attorney"); 668 F. Supp.

lina violated the Fourteenth Amendment by failing to provide research facilities to help them prepare habeas corpus petitions and federal civil rights complaints. Stressing "meaningful" access to the courts as a "touchstone," *id.*, at 823, we held:

> "[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.*, at 828.

Far from creating a discrete constitutional right, *Bounds* constitutes one part of a jurisprudence that encompasses "right-to-counsel" as well as "access-to-courts" cases. Although each case is shaped by its facts, all share a concern, based upon the Fourteenth Amendment, that accused and convicted persons be permitted to seek legal remedies without arbitrary governmental interference.

At the fountainhead of this body of law is *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932), which recognized that "[e]ven the intelligent and educated layman . . . requires the guiding hand of counsel at every step in the proceedings against him." The Court reversed the convictions and death sentences of seven black men, charged with the rape of two white women, because the state court failed to designate counsel until the morning of trial. Reasoning that the "notice and hearing" guaranteed by the Due Process Clause "would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel," *id.*, at 68–69, the Court held:

> "[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether

511, 516, n. 4 (ED Va. 1986) ("[C]hanging the theory under which relief is sought would not alter the analysis").

requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Id.*, at 71.

Particular circumstances thus defined the degree to which the Fourteenth Amendment protected petitioners in *Powell* against arbitrary criminal prosecution or punishment. Similarly, in *Griffin* v. *Illinois*, 351 U. S. 12, 18–19 (1956), the Court focused on "[s]tatistics show[ing] that a substantial proportion of criminal convictions are reversed by state appellate courts" in concluding that once a State allows appeals of convictions, it cannot administer its appellate process in a discriminatory fashion. Finding no rational basis for requiring appellants to pay for trial transcripts, "effectively den[ying] the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance," the Court held that the Fourteenth Amendment required States to furnish transcripts to indigents. *Id.*, at 18. Accord, *Burns* v. *Ohio*, 360 U. S. 252 (1959) ($20 fee to file appeal). The principles articulated in *Griffin* soon were applied to invalidate similar restraints on state postconviction review. *Lane* v. *Brown*, 372 U. S. 477 (1963) (transcript); *Smith* v. *Bennett*, 365 U. S. 708 (1961) (filing fee).

On the same day in 1963, the Court held that the Fourteenth Amendment guaranteed indigent defendants assistance of counsel both at trial, *Gideon* v. *Wainwright*, 372 U. S. 335, and on their first appeal as of right, *Douglas* v. *California*, 372 U. S. 353. Applying the Sixth Amendment's express right of counsel to the States, the Court in *Gideon* departed from the special circumstances analysis in favor of a categorical approach.[2] But because of the absence

[2] See *Gideon*, 372 U. S., at 342–344. Justice Harlan made explicit *Gideon*'s abandonment of the special circumstances rule in the context of the right to counsel in serious criminal prosecutions. *Id.*, at 350–351 (concurring opinion). But see *id.*, at 348, n. 2 (Clark, J., concurring in result)

of a constitutional right to appeal, see *McKane* v. *Durston*, 153 U. S. 684 (1894), the Court decided *Douglas* by assessing the facts in light of the Fourteenth Amendment.[3] The Court's reasons for invalidating California's appellate procedure—by which the appellate court undertook an *ex parte* examination of "the barren record" to determine whether an appeal merited appointment of counsel, 372 U. S., at 356—echoed its earlier statements in *Griffin:*

> "When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure. . . . [T]he discrimination is not between 'possibly good and obviously bad cases,' but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. . . . The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas*, 372 U. S., at 357–358.

In two subsequent opinions the Court rejected inmates' attempts to secure legal assistance. In *Ross* v. *Moffitt*, 417 U. S. 600 (1974), the Court held there was no right to appointment of counsel for discretionary state appeals or certiorari petitions to this Court. It later announced for the first

(linking *Gideon* to *Griffin* v. *Illinois*, 351 U. S. 12 (1956), and *Ferguson* v. *Georgia*, 365 U. S. 570 (1961), also a Fourteenth Amendment case).

[3] The Court consistently has adhered to Justice Sutherland's observation in *Powell* v. *Alabama*, 287 U. S. 45, 53, 71 (1932), that when assistance of counsel is required, that assistance must be "effective" rather than *pro forma*. See *Evitts* v. *Lucey*, 469 U. S. 387 (1985); *Strickland* v. *Washington*, 466 U. S. 668 (1984); *Wainwright* v. *Torna*, 455 U. S. 586 (1982) *(per curiam)*. Cf. *Penson* v. *Ohio*, 488 U. S. 75, 85 (1988) ("The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over").

time that a State has no obligation to provide defendants with any collateral review of their convictions, and that if it does, "the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well." *Pennsylvania* v. *Finley*, 481 U. S., at 557. Although one might distinguish these opinions as having a different legal basis than the present case,[4] it is preferable to consider them, like *Powell*, *Griffin*, *Douglas*, and *Bounds*, as applications of the Fourteenth Amendment's guarantees to particular situations. Indeed the Court reaffirmed in *Ross:*

> "The Fourteenth Amendment . . . does require that the state appellate system be 'free of unreasoned distinctions,' *Rinaldi* v. *Yeager*, 384 U. S. 305, 310 (1966), and that indigents have an adequate opportunity to present their claims fairly within the adversary system. *Griffin* v. *Illinois*, *supra; Draper* v. *Washington*, 372 U. S. 487 (1963). The State cannot adopt procedures which leave an indigent defendant 'entirely cut off from any appeal at all,' by virtue of his indigency, *Lane* v. *Brown*, 372 U. S., at 481, or extend to such indigents merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.' *Douglas* v. *California*, *supra*, at 358. The question is not one of absolutes, but one of degrees." 417 U. S., at 612.

II

These precedents demonstrate that the appropriate question in this case is not whether there is an absolute "right to counsel" in collateral proceedings, but whether due process requires that these respondents be appointed counsel in order to pursue legal remedies. Three critical differences between *Finley* and this case demonstrate that even if it is

[4] The en banc majority below, for instance, distinguished *Pennsylvania* v. *Finley*, 481 U. S. 551 (1987), in part on the ground that it "was not a meaningful access case, nor did it address the rule enunciated in *Bounds* v. *Smith*." 847 F. 2d, at 1122.

permissible to leave an ordinary prisoner to his own resources in collateral proceedings, it is fundamentally unfair to require an indigent death row inmate to initiate collateral review without counsel's guiding hand. I shall address each of these differences in turn.

First. These respondents, like petitioners in *Powell* but unlike respondent in *Finley*, have been condemned to die. Legislatures conferred greater access to counsel on capital defendants than on persons facing lesser punishment even in colonial times.[5] Our First Congress required assignment of up to two attorneys to a capital defendant at the same time it initiated capital punishment;[6] nearly a century passed before Congress provided for appointment of counsel in other contexts. See *Mallard* v. *United States District Court*, 490 U. S. 296 (1989) (interpreting Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252, now codified at 28 U. S. C. § 1915(d)). Similarly, Congress at first limited the federal right of appeal to capital cases. See *Evitts* v. *Lucey*, 469 U. S. 387, 409 (1985) (REHNQUIST, J., dissenting). Just last year, it enacted a statute requiring provision of counsel for state and federal prisoners seeking federal postconviction relief—but only if they are under sentence of death.[7]

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[5] The Colonies of Pennsylvania, South Carolina, and Virginia made counsel more available to capital defendants than to persons accused of other offenses. See *Powell*, 287 U. S., at 61–63, 65.

[6] Act of Apr. 30, 1790, ch. 9, §§ 1, 3, 8–10, 14, 1 Stat. 112–115 (authorizing death sentence for willful murder, treason, and other crimes); *id.*, § 29, 1 Stat. 118, as amended, 18 U. S. C. § 3005 (requiring appointment of counsel for capital defendants).

[7] The Anti-Drug Abuse Act of 1988, § 7001(b), Pub. L. 100–690, 102 Stat. 4393–4394, codified at 21 U. S. C. §§ 848(q)(4)(B), (q)(8) (1988 ed.) provides in pertinent part:

"(B) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and

This Court also expanded capital defendants' ability to secure counsel and other legal assistance long before bestowing similar privileges on persons accused of less serious crimes.[8] Both before and after *Furman* v. *Georgia*, 408 U. S. 238 (1972), established that the Constitution requires channeling of the death-sentencing decision, various Members of this Court have recognized that "the penalty of death is qualitatively different from a sentence of imprisonment, however long." *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion).[9]

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the furnishing of such other services in accordance with paragrap[h] . . . (8) . . . .

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"(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications, for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant."

[8] *Powell* v. *Alabama*, 287 U. S. 45 (1932), for instance, established a right to appointment of counsel for capital defendants three decades before that right was extended to felony defendants facing imprisonment. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), overruling *Betts* v. *Brady*, 316 U. S. 455 (1942). See *Hamilton* v. *Alabama*, 368 U. S. 52 (1961) (reversing State's denial of postconviction relief for petitioner who was not represented by counsel at arraignment on capital charge). In *Bute* v. *Illinois*, 333 U. S. 640, 674 (1948), the Court held that a state court was not required to query a defendant in a noncapital case regarding his desire for counsel. "On the other hand," Justice Burton pointed out in the majority opinion, "this Court repeatedly has held that failure to appoint counsel to assist a defendant or to give a fair opportunity to the defendant's counsel to assist him in his defense where charged with a capital crime is a violation of due process of law under the Fourteenth Amendment." *Id.*, at 676 (citing cases).

[9] Among those making this point before *Furman* were Justice Frankfurter in *Andres* v. *United States*, 333 U. S. 740, 753 (1948) (concurring

The unique nature of the death penalty not only necessitates additional protections during pretrial, guilt, and sentencing phases,[10] but also enhances the importance of the appellate process. Generally there is no constitutional right to

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opinion) ("The statute reflects the movement, active during the nineteenth century, against the death sentence. The movement was impelled both by ethical and humanitarian arguments against capital punishment, as well as by the practical consideration that jurors were reluctant to bring in verdicts which inevitably called for its infliction"), and again in *Leland* v. *Oregon*, 343 U. S. 790, 803 (1952) (dissenting opinion) ("Even though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law"), and Justice Reed in *Andres*, *supra*, at 752 (opinion of the Court) ("In death cases doubts such as those presented here should be resolved in favor of the accused").

In 1983, 11 years after *Furman* had been decided, JUSTICE O'CONNOR observed in a majority opinion that the "Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California* v. *Ramos*, 463 U. S. 992, 998–999; see *id.*, at 999, n. 9 (citing cases). See also, *e. g.*, *Ford* v. *Wainwright*, 477 U. S. 399, 411 (1986) (MARSHALL, J., plurality opinion) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. . . . This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different"); *Ake* v. *Oklahoma*, 470 U. S. 68, 87 (1985) (Burger, C. J., concurring in judgment) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases"); *Gardner* v. *Florida*, 430 U. S. 349, 357–358 (1977) (STEVENS, J., plurality opinion) ("From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion").

[10] *E. g.*, *Satterwhite* v. *Texas*, 486 U. S. 249 (1988); *Booth* v. *Maryland*, 482 U. S. 496 (1987); *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985); *Spaziano* v. *Florida*, 468 U. S. 447, 456 (1984); *Beck* v. *Alabama*, 447 U. S. 625 (1980); *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion). Accord, *ante*, at 8–9.

appeal a conviction. See, *e. g.*, *McKane* v. *Durston*, 153 U. S. 684 (1894). "[M]eaningful appellate review" in capital cases, however, "serves as a check against the random or arbitrary imposition of the death penalty." *Gregg* v. *Georgia*, 428 U. S. 153, 195, 206 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). It is therefore an integral component of a State's "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980).[11]

Ideally, "direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence." *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983). There is, however, significant evidence that in capital cases what is ordinarily considered direct review does not sufficiently safeguard against miscarriages of justice to warrant this presumption of finality.[12] Federal habeas

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[11] Accord, *Woodson* v. *North Carolina*, 428 U. S. 280, 303 (1976) (plurality opinion); *Proffitt* v. *Florida*, 428 U. S. 242, 251, 253, 258–259 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.); *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.); *Gregg* v. *Georgia*, 428 U. S. 153, 188 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). Cf. *Ramos*, 463 U. S., at 999; *Zant* v. *Stephens*, 462 U. S. 862, 876 (1983); *Griffin*, 351 U. S., at 21 (Frankfurter, J., concurring in judgment) ("Since capital offenses are *sui generis*, a State may take account of the irrevocability of death by allowing appeals in capital cases and not in others").

[12] Nor can we overlook our experience that capital litigation proceeds apace after affirmance of a conviction. With the vigorous opposition of state legal departments, capital defendants seek not only review of state and federal judicial decisions, but also relief from state governors and parole boards. See Powell, Capital Punishment, 102 Harv. L. Rev. 1035, 1038–1041 (1989). Thus the conviction and sentence in a capital case will not be "final," or undisturbed, until the sentence either is executed or set aside. Cf. *Barefoot* v. *Estelle*, 463 U. S. 880, 888 (1983). With the cases of over half the Nation's more than 2,100 inmates yet to move into collat-

courts granted relief in only 0.25% to 7% of noncapital cases in recent years; in striking contrast, the success rate in capital cases ranged from 60% to 70%.[13] Such a high incidence of uncorrected error demonstrates that the meaningful appellate review necessary in a capital case extends beyond the direct appellate process.

Second. In contrast to the collateral process discussed in *Finley*, Virginia law contemplates that some claims ordinarily heard on direct review will be relegated to postconviction proceedings. Claims that trial or appellate counsel provided constitutionally ineffective assistance, for instance, usually cannot be raised until this stage. See *Frye* v. *Commonwealth*, 231 Va. 370, 345 S. E. 2d 267 (1986). Furthermore, some irregularities, such as prosecutorial misconduct, may not surface until after the direct review is complete. *E. g.*, *Amadeo* v. *Zant*, 486 U. S. 214 (1988) (prosecutor deliberately underrepresented black people and women in jury pools); *Brady* v. *Maryland*, 373 U. S. 83 (1963). Occasionally, new evidence even may suggest that the defendant is innocent. *E. g.*, *Ex parte Adams*, No. 70,787 (Tex. Cr. App., Mar. 1, 1989) (available on Lexis); *McDowell* v. *Dixon*, 858

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eral proceedings, Wilson & Spangenberg, State Post-Conviction Representation of Defendants Sentenced to Death, 72 Judicature 331, 332 (1989), the need for an orderly sequence of review is pellucid. As THE CHIEF JUSTICE has remarked: "'We judges have no right to insist that matters such as these proceed at a leisurely pace, or even at an ordinary pace, but I think we do have a claim to have explored the possibility of imposing some reasonable regulations in a situation which is disjointed and chaotic.'" Remarks before the National Conference of Chief Justices (Jan. 27, 1988), quoted in Powell, *supra*, at 1040.

[13] Mello, Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row, 37 Am. U. L. Rev. 513, 520–521 (1988). The former Chief Judge of the Eleventh Circuit, which has the greatest volume of capital litigation, recently estimated that in his Circuit capital defendants' success rate in collateral proceedings may be as high as one-third to one-half of all such cases. Godbold, *Pro Bono* Representation of Death Sentenced Inmates, 42 Record of N. Y. C. B. A. 859, 873 (1987). Cf. *Barefoot*, 463 U. S., at 915 (MARSHALL, J., dissenting).

F. 2d 945 (CA4 1988), cert. denied, 489 U. S. 1033 (1989). Given the irreversibility of capital punishment, such information deserves searching, adversarial scrutiny even if it is discovered after the close of direct review.

The postconviction procedure in Virginia may present the first opportunity for an attorney detached from past proceedings to examine the defense and to raise claims that were barred on direct review by prior counsel's ineffective assistance. A fresh look may reveal, for example, that a prior conviction used to enhance the defendant's sentence was invalid, *e. g.*, *Johnson* v. *Mississippi*, 486 U. S. 578 (1988); or that the defendant's mental illness, lack of a prior record, or abusive childhood should have been introduced as evidence in mitigation at his sentencing hearing, *e. g.*, *Curry* v. *Zant*, 258 Ga. 527, 371 S. E. 2d 647 (1988). Defense counsel's failure to object to or assert such claims precludes direct appellate review of them.[14] The postconviction proceeding gives inmates another chance to rectify defaults.[15] In Virginia,

[14] The Virginia Supreme Court requires contemporaneous objection before it will consider any asserted trial error on direct review. Va. Sup. Ct. Rule 5:21. Likewise, it does not review the entire case record, but only questions clearly assigned as errors on appeal. See *ibid.*; Va. Code § 17.110.1 (1988). See also *Quintana* v. *Commonwealth*, 224 Va. 127, 295 S. E. 2d 643 (1982), cert. denied, 460 U. S. 1029 (1983).

This Court abides by States' applications of rules precluding direct review of procedurally defaulted claims, see *Caldwell*, 472 U. S., at 327, sometimes in confidence that an obvious error will be corrected on collateral review. *E. g.*, *Watkins* v. *Virginia*, 475 U. S. 1099, 1100 (1986) (opinion of STEVENS, J., respecting the denial of petition for certiorari in 229 Va. 469, 331 S. E. 2d 422 (1985)).

[15] The Virginia Supreme Court will consider previously defaulted claims on postconviction review if the petitioner shows that counsel was ineffective in failing to assert a claim or object to an error. See *Slayton* v. *Parrigan*, 215 Va. 27, 205 S. E. 2d 680 (1974), cert. denied, 419 U. S. 1108 (1975). Failure to do so may forever bar review, for Virginia does not allow a claim that could have been raised in the first postconviction petition to be asserted in a successive petition. Va. Code § 8.01–654(B)(2) (1984). See 847 F. 2d, at 1120, n. 4; *Whitley* v. *Bair*, 802 F. 2d 1487 (CA4 1986), cert. denied, 480 U. S. 951 (1987).

therefore, postconviction proceedings are key to meaningful appellate review of capital cases.

State postconviction proceedings also are the cornerstone for all subsequent attempts to obtain collateral relief. Once a Virginia court determines that a claim is procedurally barred, a federal court may not review it unless the defendant can make one of two difficult showings: that there was both cause for the default and resultant prejudice, or that failure to review will cause a fundamental miscarriage of justice. *Murray* v. *Carrier*, 477 U. S. 478, 485, 495 (1986); *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977). If an asserted claim is tested in an evidentiary hearing, the state postconviction court's factual findings may control the scope of a federal court's review of a subsequent petition for a writ of habeas corpus pursuant to 28 U. S. C. § 2254.[16]

Nor may a defendant circumvent the state postconviction process by filing a federal habeas petition. In *Rose* v. *Lundy*, 455 U. S. 509 (1982), this Court held that in order to comply with the exhaustion provision of 28 U. S. C. § 2254(c), federal courts should dismiss petitions containing claims that have not been "fairly presented to the state courts," *Picard* v. *Connor*, 404 U. S. 270, 275 (1971), for both direct and postconviction review, *Castille* v. *Peoples*, 489 U. S. 346 (1989). Given the stringency with which this Court adheres to procedural default rules,[17] it is of great importance to the prisoner

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[16] Indeed, if the petitioner is represented by counsel at the hearing, the court's factual findings attain a presumption of correctness that may bar further factual review by the federal court. 28 U. S. C. § 2254(d)(5). See *Sumner* v. *Mata*, 449 U. S. 539 (1981).

[17] See, *e. g.*, *Dugger* v. *Adams*, 489 U. S. 401 (1989) (declining to review claim that jury was instructed inaccurately regarding its role in the capital sentencing process); *Teague* v. *Lane*, 489 U. S. 288 (1989) (holding procedurally barred claim, asserted by petitioner serving life term for murder, that jury was selected in a biased manner in violation of *Swain* v. *Alabama*, 380 U. S. 202 (1965)). See also n. 14, *supra*.

that all his substantial claims be presented fully and professionally in his first state collateral proceeding.[18]

Third. As the District Court's findings reflect, the plight of the death row inmate constrains his ability to wage collateral attacks far more than does the lot of the ordinary inmate considered in *Finley*.[19] The District Court found that the death row inmate has an extremely limited period to prepare and present his postconviction petition and any necessary applications for stays of execution. 668 F. Supp. 511, 513 (ED Va. 1986). Unlike the ordinary inmate, who presumably has ample time to use and reuse the prison library and to seek guidance from other prisoners experienced in preparing *pro se* petitions, cf. *Johnson* v. *Avery*, 393 U. S. 483 (1969), a grim deadline imposes a finite limit on the condemned person's capacity for useful research.[20]

Capital litigation, the District Court observed, is extremely complex. 668 F. Supp., at 513. Without regard to the special characteristics of Virginia's statutory proce-

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[18] The availability of appointed counsel on federal habeas, see n. 7, *supra*, thus presents the specter of a petitioner filing for federal habeas corpus and attaining counsel, only to have the petition dismissed as unexhausted and remanded to state court. Such a haphazard procedure scarcely would serve any interest in finality. It further would raise questions regarding the obligations not only of the appointed counsel to effect exhaustion at the state level, but also of the Federal Treasury to pay for those efforts. Cf. *Ex parte Hull*, 312 U. S. 546, 549 (1941) ("[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus").

[19] I am at a loss as to why the plurality today prefers to label the District Court findings of fact, based upon trial testimony and post-trial submissions, "'considerations.'" See *ante*, at 4–5, 6.

[20] An execution may be scheduled for any time 30 days after the date of sentencing. Va. Code § 53.1–232 (1988); see 668 F. Supp., at 513. A 1988 study commissioned by the American Bar Association found that *attorneys* spent an average of 992 hours and $3,686 on each capital postconviction proceeding in Virginia. Brief for American Bar Association as *Amicus Curiae* 34 (hereinafter ABA Brief).

dures,[21] this Court's death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master.[22] A judgment that it is not unfair to require an ordinary inmate to rely on his own resources to prepare a petition for postconviction relief, see *Finley*, 481 U. S., at 557, does not justify the same conclusion for the death row inmate who must acquire an understanding of this specialized area of the law and prepare an application for stay of execution as well as a petition for collateral relief.[23] This is especially true, the District Court concluded, because the "evidence gives rise to a fair inference that an inmate preparing himself and his family for impending death is incapable of performing the mental functions necessary to adequately pursue his claims."[24] 668 F. Supp., at 513.

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[21] The District Court commented:

"In Virginia, the capital trial is bifurcated, entailing separate proceedings to determine guilt and to set the appropriate punishment. Aside from analyzing the voluminous transcript of the guilt determination phase which not infrequently lasts several days, a great deal of time must be devoted to analyzing the issues of mitigation and aggravation characteristic of the sentencing phase of a capital case." 668 F. Supp., at 513.

[22] In apparent recognition of this fact, Congress has required that when a court appoints counsel in capital postconviction proceedings, at least one attorney must have been a member of the bar for at least five years and have at least three years felony litigation experience. § 7001(b) of the Anti-Drug Abuse Act of 1988, Pub. L. 100–690, 102 Stat. 4394, codified at 21 U. S. C. §§ 828(q)(5), (q)(6) (1988 ed.).

[23] Compounding matters is the typically low educational attainment of prisoners. In 1982 more than half of Florida's general inmate population was found to be functionally illiterate, while in 1979 the State's death row inmates possessed a ninth-grade mean educational level. ABA Brief 26–27. Virginia's death row inmates apparently have similar educational backgrounds. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 20–21, n. 7. See also Brief for Maryland State Bar Association et al. as *Amici Curiae* 16–17 (State Bar Brief) (citing similar statistics for other States' inmate populations).

[24] For example, one lawyer testified:

"I have had lots of clients in those last 60 day time periods, and what they are forced to do is to prepare themselves mentally and spiritually and emo-

These three critical factors demonstrate that there is a profound difference between capital postconviction litigation and ordinary postconviction litigation in Virginia. The District Court's findings unequivocally support the conclusion that to obtain an adequate opportunity to present their postconviction claims fairly, death row inmates need greater assistance of counsel than Virginia affords them. Cf. *id.*, at 514–515. Meaningful access, and meaningful judicial review, would be effected in this case only if counsel were appointed, on request, in time to enable examination of the case record, factual investigation, and preparation of a petition containing all meritorious claims, which the same attorney then could litigate to its conclusion.

III

Although in some circumstances governmental interests may justify infringements on Fourteenth Amendment rights, cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 334–335 (1976), Virginia has failed to assert any interest that outweighs respondents' right to legal assistance. The State already appoints counsel to death row inmates who succeed in filing postconviction petitions asserting at least one nonfrivolous claim; therefore, the additional cost of providing its 32 death row inmates competent counsel to prepare such petitions should be minimal. See 668 F. Supp., at 512, 515. Furthermore, multiple filings delay the conclusion of capital litigation and exacerbate the already serious burden these cases im-

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tionally to deal with their family and their children, all of whom see them as about to die. And that is a full time job.

"And very few of them, I think, even have the emotional resources to talk with you meaningfully at that point about their case. Much less to take it over." App. 66.

Cf. *Medley*, 134 U. S. 160, 172 (1890) ("[W]hen a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place").

pose on the State's judicial system and the legal department. It seems obvious that professional preparation of the first postconviction petition, by reducing successive petitions, would result in a net benefit to Virginia.[25]

Of the 37 States authorizing capital punishment, at least 18 automatically provide their indigent death row inmates counsel to help them initiate state collateral proceedings.[26] Thirteen of the 37 States have created governmentally funded re-

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[25] A representative of the Virginia attorney general's office testified regarding the office's policy not to oppose a death row inmate's motion for appointment of postconviction counsel as follows:

"Well, basically we want to see the inmate have an attorney at State Habeas for reasons of economy and efficiency.

"When you have a death case, we recognize that it is going to be prolonged litigation and we want to see all matters that the inmate or the petitioner wants to raise be raised at one proceeding, and we can deal more efficiently with an attorney. And we prefer that from an economy standpoint we don't have to have more than one proceeding." App. 272.

Cf. Powell, 102 Harv. L. Rev., at 1040 (attributing delay in carrying out capital punishment in part to lack of counsel on collateral review).

[26] Ariz. Rule Crim. Proc. 32.5(b); Cal. Govt. Code Ann. § 15421(c) (West 1980), Cal. Penal Code Ann. § 1240 (West 1982); Conn. Super. Ct. Rules, Criminal Cases § 959, Conn. Gen. Stat. § 51–296(a) (1989); Fla. Stat. § 27.702 (1987); Idaho Code § 19–4904 (1987); Ind. Rule Proc. for Post-Conviction Remedies 1, § 9; Md. Ann. Code, Art. 27, § 645A(f) (Supp. 1988); Mo. Rules Crim. Proc. 24.035(e), 29.15(e); N. J. Rules Governing Criminal Practice 3:22–6, 3:27–1, N. J. Stat. Ann. § 2A:158A–5 (West Supp. 1989–1990); N. C. Gen. Stat. §§ 15A–1421 (1988), 7A–451(a)(2) (Supp. 1988), 7A–486.3 (1986); Okla. Stat., Tit. 22, § 1089 (Supp. 1988); Ore. Rev. Stat. § 138.590(3) (1987); Pa. Rule Crim. Proc. 1503; S. D. Codified Laws § 21–27–4 (1987); Tenn. Sup. Ct. Rule 13, § 1; Utah Rule Civ. Proc. 65B(i)(5); Vt. Stat. Ann., Tit. 13, §§ 5231–5233, 7131 (1974), as interpreted in *In re Morse*, 138 Vt. 327, 415 A. 2d 232 (1980); Wash. Super. Ct. Crim. Rule 3.1(b)(2).

In addition to these 18 States, 3—Montana, Nevada, and Wyoming—have no definitive case or statutory law on this point but are listed in a 1988 study commissioned by the American Bar Association as having a practice of mandatory appointment of counsel on request. Wilson & Spangenberg, 72 Judicature, at 334 (Table 1).

source centers to assist counsel in litigating capital cases.[27] Virginia is among as few as five States that fall into neither group and have no system for appointing counsel for condemned prisoners before a postconviction petition is filed.[28] In *Griffin*, the Court proscribed Illinois' discriminatory barrier to appellate review in part because many other States already had rejected such a barrier. 351 U. S., at 19; cf. *Gideon*, 372 U. S., at 345 (noting that 22 States supported right to trial counsel). Similarly, the trend in most States to expand legal assistance for their death row inmates further

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[27] They are Alabama, Arizona, California, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas. State Bar Brief 34. See Mello, 37 Am. U. L. Rev., at 593–606 (discussing development of Florida's resource center); cf. Godbold, 42 Record of N. Y. C. B. A., at 868–871 (state and federal efforts to provide legal assistance). As a result of several studies it has commissioned concerning the significance of providing counsel in capital postconviction proceedings, the American Bar Association "has recognized that the only feasible way to provide death row inmates with meaningful access to the courts is the implementation in each state which imposes capital punishment of a governmentally-funded system under which qualified, compensated attorneys represent death row inmates in state post-conviction proceedings." ABA Brief 4–5.

[28] Of 27 States that responded to a 1988 survey, only Virginia, Nebraska, Pennsylvania, and Nevada were reported to have no system "to monitor and assure that counsel will be provided prior to the filing of a post-conviction petition." Wilson & Spangenberg, *supra*, at 335. Of those, only Virginia and Nevada have executed prisoners since this Court decided *Furman* v. *Georgia*, 408 U. S. 238 (1972). NAACP Legal Defense and Education Fund, Inc., Death Row, U. S. A. 3 (March 1, 1989) (Death Row). Pennsylvania, and perhaps Nevada, appoint counsel automatically upon request. See n. 26, *supra*. Of the 10 States that have death penalty statutes but were not part of the survey, only Arkansas, Colorado, and New Hampshire have neither rules for automatic appointment of counsel nor resource centers. None of these States has conducted a post-*Furman* execution; New Hampshire, in fact, has no prisoner under sentence of death, and Colorado has none whose case has reached the state postconviction stage. Death Row, *supra*, at 1; Wilson & Spangenberg, *supra*, at 334.

dilutes Virginia's weak justifications for refusing to do so, and "lends convincing support to the conclusion" of the courts below that these respondents have a fundamental right to the relief they seek. See *Powell*, 287 U. S., at 73.

IV

The basic question in this case is whether Virginia's procedure for collateral review of capital convictions and sentences assures its indigent death row inmates an adequate opportunity to present their claims fairly. The District Court and Court of Appeals en banc found that it did not, and neither the State nor this Court's majority provides any reasoned basis for disagreeing with their conclusion. Simple fairness requires that this judgment be affirmed.

I respectfully dissent.

GRANFINANCIERA, S. A., ET AL. *v.* NORDBERG, CREDITOR TRUSTEE FOR THE ESTATE OF CHASE & SANBORN CORP., FKA, GENERAL COFFEE CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 87–1716. Argued January 9, 1989—Decided June 23, 1989

Respondent, the bankruptcy trustee for a corporation undergoing Chapter 11 reorganization, filed suit in the District Court against petitioners, seeking to avoid allegedly fraudulent monetary transfers to them by the bankrupt corporation's predecessor and to recover damages, costs, expenses, and interest. The court referred the proceedings to the Bankruptcy Court. Shortly after the Colombian Government nationalized petitioner Granfinanciera, S. A., petitioners requested a jury trial. The Bankruptcy Judge denied the request, deeming a suit to recover a fraudulent transfer a "core action" which, under his understanding of English common law, "was a non-jury issue." The District Court affirmed the Bankruptcy Court's judgment for respondent, without discussing petitioners' jury trial request. The Court of Appeals also affirmed, ruling, *inter alia*, that the Seventh Amendment supplied no right to a jury trial, because fraudulent conveyance actions are equitable in nature, even when a plaintiff seeks only monetary relief; because bankruptcy proceedings themselves are inherently equitable in nature; and because Congress has displaced any right to a jury trial by designating, in 28 U. S. C. § 157(b)(2)(H), fraudulent conveyance actions as "core proceedings" triable by bankruptcy judges sitting without juries.

Held:

1. This Court will not address respondent's contention that the judgment below should be affirmed as to petitioner Granfinanciera because it was a commercial instrumentality of the Colombian Government when it made its request for a jury trial and was therefore not entitled to such a trial under the Seventh Amendment or applicable statutory provisions. This difficult question was neither raised below nor adequately briefed and argued here, and this is not an "exceptional case" as to which the Court will consider arguments not raised below. Moreover, petitioners' claim is uncontradicted that an affirmance on the ground respondent now urges would enlarge respondent's rights under the judgment below and decrease those of Granfinanciera. Pp. 38–40.

2. Provided that Congress has not permissibly assigned resolution of the claim to a non-Article III adjudicative body that does not use a jury as factfinder, the Seventh Amendment entitles a person who has not submitted a claim against a bankruptcy estate to a jury trial when sued by the bankruptcy trustee to recover an allegedly fraudulent monetary transfer. Pp. 40–49.

(a) Since this Court's decisions, early English cases, and scholarly authority all demonstrate that respondent would have had to bring his action at law in 18th-century England, and that a court of equity would not have adjudicated it, it must be concluded preliminarily that the action is a "Sui[t] at common law" for which a jury trial is required by the Seventh Amendment. Pp. 43–47.

(b) More importantly, the nature of the relief respondent seeks—the recovery of money payments of ascertained and definite amounts—conclusively demonstrates that his cause of action should be characterized as legal rather than equitable, such that petitioners are prima facie entitled to a jury trial under the Amendment. *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92. Pp. 47–49.

3. The Seventh Amendment entitles petitioners to their requested jury trial notwithstanding § 157(b)(2)(H)'s designation of fraudulent conveyance actions as "core proceedings" which non-Article III bankruptcy judges may adjudicate. Pp. 49–65.

(a) Although the Seventh Amendment does not prohibit Congress from assigning resolution of a statutory claim that is legal in nature to a non-Article III tribunal that does not use a jury as a factfinder so long as the claim asserts a "public right," Congress lacks the power to strip parties who are contesting matters of private right of their constitutional right to a jury trial. See, *e. g.*, *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442; *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50. For these purposes, a "public right" is not limited to a matter arising between the Government and others, but extends to a seemingly "private" right that is closely intertwined with a federal regulatory program that Congress has power to enact. *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 586, 593–594. Pp. 51–55.

(b) A bankruptcy trustee's right to recover a fraudulent conveyance is more accurately characterized as a private rather than a public right. Although the plurality in *Northern Pipeline Construction Co.*, *supra*, at 71, noted that the restructuring of debtor-creditor relations in bankruptcy may well be a "public right," it also emphasized that state-law causes of action for breach of contract are paradigmatic private rights, even when asserted by an insolvent corporation in the midst of Chapter 11 reorganization proceedings. Trustees' fraudulent conveyance actions

are quintessentially common-law suits that more nearly resemble state-law contract claims by a bankrupt corporation to augment the bankruptcy estate than they do creditors' claims to a pro rata share of the bankruptcy res. This analysis is confirmed by *Katchen* v. *Landy*, 382 U. S. 323, 327–328, which must be read to hold that a creditor's Seventh Amendment right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor submitted a claim against the estate. Since petitioners here have not filed such claims, respondent's suit is neither part of the claims adjudication process nor integral to the restructuring of debtor-creditor relations. Congress therefore cannot divest petitioners of their Seventh Amendment right merely by relabeling a pre-existing, common-law cause of action to which that right attaches and assigning it to a specialized court of equity, particularly where there is no evidence that Congress considered the constitutional implications of its designation of all fraudulent conveyance actions as core proceedings. Pp. 55–61.

(c) Permitting jury trials in fraudulent conveyance actions will not significantly impair the functioning of the legislative scheme. It cannot seriously be argued that allowing such actions in a trustee's suit against a person who has not entered a claim against the estate would "go far to dismantle the statutory scheme," as that phrase was used in *Atlas Roofing*, *supra*, at 454, n. 11, since *Atlas* plainly assumed that such claims carried with them a right to a jury trial. In addition, it cannot easily be said that a jury would be incompatible with bankruptcy proceedings, since Congress has expressly provided for jury trials in certain other actions arising out of bankruptcy litigation. The claim that juries may serve usefully as checks only on life-tenured judges' decisions overlooks the potential for juries to exercise beneficial restraint on the decisions of fixed-term judges, who may be beholden to Congress or the Executive. Moreover, although providing jury trials in some fraudulent conveyance actions might impede swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations, these considerations are insufficient to overcome the Seventh Amendment's clear command. Pp. 61–63.

835 F. 2d 1341, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, STEVENS, and KENNEDY, JJ., joined, and in Parts I, II, III, and V, of which SCALIA, J., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 65. WHITE, J., filed a dissenting opinion, *post*, p. 71. BLACKMUN, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 91.

Adam Lawrence argued the cause for petitioners. With him on the briefs was *Boyce F. Ezell III.*

Laurence H. Tribe argued the cause for respondent. With him on the brief were *Gary Jones* and *Saturnino E. Lucio II.*

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer. We hold that the Seventh Amendment entitles such a person to a trial by jury, notwithstanding Congress' designation of fraudulent conveyance actions as "core proceedings" in 28 U. S. C. § 157(b)(2)(H) (1982 ed., Supp. V).

I

The Chase & Sanborn Corporation filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in 1983. A plan of reorganization approved by the United States Bankruptcy Court for the Southern District of Florida vested in respondent Nordberg, the trustee in bankruptcy, causes of action for fraudulent conveyances. App. to Pet. for Cert. 37. In 1985, respondent filed suit against petitioners Granfinanciera, S. A., and Medex, Ltda., in the United States District Court for the Southern District of Florida. The complaint alleged that petitioners had received $1.7 million from Chase & Sanborn's corporate predecessor within one year of the date its bankruptcy petition was filed, without receiving consideration or reasonably equivalent value in return. *Id.*, at 39–40. Respondent sought to avoid what he alleged were constructively and actually fraudulent transfers and to recover damages, costs, expenses, and interest under 11 U. S. C. §§ 548(a)(1) and (a)(2), 550(a)(1) (1982 ed. and Supp. V). App. to Pet. for Cert. 41.

The District Court referred the proceedings to the Bankruptcy Court. Over five months later, and shortly before the Colombian Government nationalized Granfinanciera, respond-

ent served a summons on petitioners in Bogota, Colombia. In their answer to the complaint following Granfinanciera's nationalization, both petitioners requested a "trial by jury on all issues so triable." App. 7. The Bankruptcy Judge denied petitioners' request for a jury trial, deeming a suit to recover a fraudulent transfer "a core action that originally, under the English common law, as I understand it, was a non-jury issue." App. to Pet. for Cert. 34. Following a bench trial, the court dismissed with prejudice respondent's actual fraud claim but entered judgment for respondent on the constructive fraud claim in the amount of $1,500,000 against Granfinanciera and $180,000 against Medex. *Id.*, at 24–30. The District Court affirmed without discussing petitioners' claim that they were entitled to a jury trial. *Id.*, at 18–23.

The Court of Appeals for the Eleventh Circuit also affirmed. 835 F. 2d 1341 (1988). The court found that petitioners lacked a statutory right to a jury trial, because the constructive fraud provision under which suit was brought—11 U. S. C. § 548(a)(2) (1982 ed., Supp. V)—contains no mention of a right to a jury trial, and 28 U. S. C. § 1411 (1982 ed., Supp. V) "affords jury trials only in personal injury or wrongful death suits." 835 F. 2d, at 1348. The Court of Appeals further ruled that the Seventh Amendment supplied no right to a jury trial, because actions to recover fraudulent conveyances are equitable in nature, even when a plaintiff seeks only monetary relief, *id.*, at 1348–1349, and because "bankruptcy itself is equitable in nature and thus bankruptcy proceedings are inherently equitable." *Id.*, at 1349. The court read our opinion in *Katchen* v. *Landy*, 382 U. S. 323 (1966), to say that "Congress may convert a creditor's legal right into an equitable claim and displace any seventh amendment right to trial by jury," and held that Congress had done so by designating fraudulent conveyance actions "core proceedings" triable by bankruptcy judges sitting without juries. 835 F. 2d, at 1349.

We granted certiorari to decide whether petitioners were entitled to a jury trial, 486 U. S. 1054 (1988), and now reverse.

II

Before considering petitioners' claim to a jury trial, we must confront a preliminary argument. Respondent contends that the judgment below should be affirmed with respect to Granfinanciera—though not Medex—because Granfinanciera was a commercial instrumentality of the Colombian Government when it made its request for a jury trial. Respondent argues that the Seventh Amendment preserves only those jury trial rights recognized in England at common law in the late 18th century, and that foreign sovereigns and their instrumentalities were immune from suit at common law. Suits against foreign sovereigns are only possible, respondent asserts, in accordance with the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U. S. C. §§ 1330, 1602–1611, and respondent reads § 1330(a)[1] to prohibit trial by jury of a case against a foreign state. Respondent concludes that Granfinanciera has no right to a jury trial, regardless of the merits of Medex's Seventh Amendment claim.

We decline to address this argument because respondent failed to raise it below and because the question it poses has not been adequately briefed and argued. Without cross-petitioning for certiorari, a prevailing party may, of course, "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals," *Washington* v. *Yakima Indian Nation*, 439 U. S. 463,

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[1] Section 1330(a) provides:

"The district courts shall have original jurisdiction without regard to amount in controversy of any *nonjury civil action* against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement." (Emphasis added.)

476, n. 20 (1979), provided that an affirmance on the alternative ground would neither expand nor contract the rights of either party established by the judgment below. See, *e. g.*, *Blum* v. *Bacon*, 457 U. S. 132, 137, n. 5 (1982); *United States* v. *New York Telephone Co.*, 434 U. S. 159, 166, n. 8 (1977). Respondent's present defense of the judgment, however, is not one he advanced below.[2] Although "we could consider grounds supporting [the] judgment different from those on which the Court of Appeals rested its decision," "where the ground presented here has not been raised below we exercise this authority 'only in exceptional cases.'" *Heckler* v. *Campbell*, 461 U. S. 458, 468–469, n. 12 (1983), quoting *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940).

This is not such an exceptional case. Not only do we lack guidance from the District Court or the Court of Appeals on this issue, but difficult questions remain whether a jury trial is available to a foreign state upon request under 28 U. S. C. § 1330 and, if not, under what circumstances a business enterprise that has since become an arm of a foreign state may be entitled to a jury trial. Compare *Gould, Inc.* v. *Pechiney*

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[2] Indeed, respondent strenuously supported the Court of Appeals' conclusion, which echoed that of the District Court, see App. to Pet. for Cert. 22, that the "FSIA is inapplicable to the case at bar," 835 F. 2d 1341, 1347 (CA11 1988), not only on the court's rationale that "the transfers in question and the suit to recover those transfers occurred before Granfinanciera was nationalized," *ibid.*, but on the more sweeping rationale that Granfinanciera never proved that it was an instrumentality of a foreign state because it had never really been nationalized. See Brief for Appellee in No. 86–5738 (CA11), pp. 21–30; Brief for Appellee in No. 86–1292 (SD Fla.), pp. 32–36. Admittedly, respondent's present position that the FSIA does not confer immunity on Granfinanciera because it was not an instrumentality of a foreign state when the alleged wrongs occurred or when respondent filed suit is not necessarily incompatible with his claim that Granfinanciera cannot qualify for a jury trial under the FSIA because it requested a jury trial after it was nationalized. Respondent has not attempted, however, to reconcile these views and did not make the second claim until he filed his merits brief in this Court.

Ugine Kuhlmann, 853 F. 2d 445, 450 (CA6 1988) (jurisdiction under 28 U. S. C. § 1330 determined by party's status when act complained of occurred); *Morgan Guaranty Trust Co. of N. Y.* v. *Republic of Palau*, 639 F. Supp. 706, 712–716 (SDNY 1986) (status at time complaint was filed is decisive for § 1330 jurisdiction), with *Callejo* v. *Bancomer, S. A.*, 764 F. 2d 1101, 1106–1107 (CA5 1985) (FSIA applies even though bank was nationalized after suit was filed); *Wolf* v. *Banco Nacional de Mexico, S. A.*, 739 F. 2d 1458, 1460 (CA9 1984) (same), cert. denied, 469 U. S. 1108 (1985). Moreover, petitioners alleged in their reply brief, without contradiction by respondent at oral argument, that affirmance on the ground that respondent now urges would "unquestionably enlarge the respondent's rights under the circuit court's decision and concomitantly decrease those of the petitioner" by "open[ing] up new areas of discovery in aid of execution" and by allowing respondent, for the first time, to recover any judgment he wins against Granfinanciera from Colombia's central banking institutions and possibly those of other Colombian governmental instrumentalities. Reply Brief for Petitioners 19. Whatever the merits of these claims, their plausibility, coupled with respondent's failure to offer rebuttal, furnishes an additional reason not to consider respondent's novel argument in support of the judgment at this late stage in the litigation. We therefore leave for another day the questions respondent's argument raises under the FSIA.

III

Petitioners rest their claim to a jury trial on the Seventh Amendment alone.[3] The Seventh Amendment provides: "In

[3] The current statutory provision for jury trials in bankruptcy proceedings—28 U. S. C. § 1411 (1982 ed., Supp. V), enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Amendments), Pub. L. 98–353, 98 Stat. 333—is notoriously ambiguous. Section 1411(a) provides: "[T]his chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." Although this sec-

Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." We have consistently interpreted the phrase "Suits at common law" to refer to "suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Parsons* v. *Bedford*, 3 Pet. 433, 447 (1830). Although "the thrust of the

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tion might suggest that jury trials are available only in personal injury and wrongful death actions, that conclusion is debatable. Section 1411(b) provides that "[t]he district court may order the issues arising [in connection with involuntary bankruptcy petitions] to be tried without a jury," suggesting that the court lacks similar discretion to deny jury trials on at least some issues presented in connection with voluntary petitions. The confused legislative history of these provisions has further puzzled commentators. See, *e. g.*, Gibson, Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment, 72 Minn. L. Rev. 967, 989–996 (1988) (hereinafter Gibson); Note, The Bankruptcy Amendments and Federal Judgeship Act of 1984: The Impact on the Right of Jury Trial in Bankruptcy Court, 16 Tex. Tech. L. Rev. 535, 543–546 (1985). Whatever the proper construction of § 1411, petitioners concede that this section does not entitle them to a jury trial. Section 122(b) of the 1984 Amendments, 98 Stat. 346, bars application of § 1411 to "cases under title 11 of the United States Code that are pending on the date of enactment of this Act or to proceedings arising in or related to such cases," and Chase & Sanborn's petition for reorganization was pending on that date. Nor does § 1411's predecessor—28 U. S. C. § 1480(a), which stated that "this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979"—seem to afford petitioners a statutory basis for their claim. As they recognize, § 1480 was apparently repealed by the 1984 Amendments. See Gibson 989, and n. 96; King, Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984, 38 Vand. L. Rev. 675, 703, and n. 79 (1985); Brief for Respondent 5, n. 11. Petitioners therefore appear correct in concluding that, "absent any specific legislation in force providing jury trials for cases filed before July 10, 1984, but tried afterwards, [their] right to jury trial in this proceeding must necessarily be predicated entirely on the Seventh Amendment." Brief for Petitioners 33, n. 7. See also Brief for Respondent 10, and n. 15.

Amendment was to preserve the right to jury trial as it existed in 1791," the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty. *Curtis* v. *Loether*, 415 U. S. 189, 193 (1974).

The form of our analysis is familiar. "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Tull* v. *United States*, 481 U. S. 412, 417–418 (1987) (citations omitted). The second stage of this analysis is more important than the first. *Id.*, at 421. If, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder.[4]

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[4] This quite distinct inquiry into whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and whether jury trials would impair the functioning of the legislative scheme, appears to be what the Court contemplated when, in *Ross* v. *Bernhard*, 396 U. S. 531, 538, n. 10 (1970), it identified "the practical abilities and limitations of juries" as an additional factor to be consulted in determining whether the Seventh Amendment confers a jury trial right. See *Tull* v. *United States*, 481 U. S., at 418, n. 4; *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 454–455 (1977). We consider this issue in Part IV, *infra*. Contrary to JUSTICE WHITE's contention, see *post*, at 79–80, we do not declare that the Seventh Amendment provides a right to a jury trial on all legal rather than equitable claims. If a claim that is legal in nature asserts a "public right," as we define that term in Part IV, then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency or specialized court of equity. See *infra*, at 51–53. The Seventh Amendment protects a litigant's right to a jury trial only if a cause of action is legal in nature and it involves a matter of "private right."

A

There is no dispute that actions to recover preferential or fraudulent transfers were often brought at law in late 18th-century England. As we noted in *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92, 94 (1932) (footnote omitted): "In England, long prior to the enactment of our first Judiciary Act, common law actions of trover and money had and received were resorted to for the recovery of preferential payments by bankrupts." See, *e. g.*, *Smith* v. *Payne*, 6 T. R. 152, 101 Eng. Rep. 484 (K. B. 1795) (trover); *Barnes* v. *Freeland*, 6 T. R. 80, 101 Eng. Rep. 447 (K. B. 1794) (trover); *Smith* v. *Hodson*, 4 T. R. 211, 100 Eng. Rep. 979 (K. B. 1791) (assumpsit; goods sold and delivered); *Vernon* v. *Hanson*, 2 T. R. 287, 100 Eng. Rep. 156 (K. B. 1788) (assumpsit; money had and received); *Thompson* v. *Freeman*, 1 T. R. 155, 99 Eng. Rep. 1026 (K. B. 1786) (trover); *Rust* v. *Cooper*, 2 Cowp. 629, 98 Eng. Rep. 1277 (K. B. 1777) (trover); *Harman* v. *Fishar*, 1 Cowp. 117, 98 Eng. Rep. 998 (K. B. 1774) (trover); *Martin* v. *Pewtress*, 4 Burr. 2477, 98 Eng. Rep. 299 (K. B. 1769) (trover); *Alderson* v. *Temple*, 4 Burr. 2235, 98 Eng. Rep. 165 (K. B. 1768) (trover). These actions, like all suits at law, were conducted before juries.

Respondent does not challenge this proposition or even contend that actions to recover fraudulent conveyances or preferential transfers were more than occasionally tried in courts of equity. He asserts only that courts of equity had concurrent jurisdiction with courts of law over fraudulent conveyance actions. Brief for Respondent 37–38. While respondent's assertion that courts of equity sometimes provided relief in fraudulent conveyance actions is true, however, it hardly suffices to undermine petitioners' submission that the present action for *monetary* relief would not have sounded in equity 200 years ago in England. In *Parsons* v. *Bedford*, *supra*, at 447 (emphasis added), we contrasted suits at law with "those where equitable rights *alone* were recognized" in holding that the Seventh Amendment right to a jury

trial applies to all but the latter actions. Respondent adduces no authority to buttress the claim that suits to recover an allegedly fraudulent transfer of money, of the sort that he has brought, were typically or indeed ever entertained by English courts of equity when the Seventh Amendment was adopted. In fact, prior decisions of this Court, see, *e. g.*, *Buzard* v. *Houston*, 119 U. S. 347, 352–353 (1886), and scholarly authority compel the contrary conclusion:

> "[W]hether the trustee's suit should be at law or in equity is to be judged by the same standards that are applied to any other owner of property which is wrongfully withheld. If the subject matter is a chattel, and is still in the grantee's possession, an action in trover or replevin would be the trustee's remedy; and if the fraudulent transfer was of cash, the trustee's action would be for money had and received. Such actions at law are as available to the trustee to-day as they were in the English courts of long ago. If, on the other hand, the subject matter is land or an intangible, or the trustee needs equitable aid for an accounting or the like, he may invoke the equitable process, and that also is beyond dispute." 1 G. Glenn, Fraudulent Conveyances and Preferences § 98, pp. 183–184 (rev. ed. 1940) (footnotes omitted).

The two cases respondent discusses confirm this account of English practice. *Ex parte Scudamore*, 3 Ves. jun. 85, 30 Eng. Rep. 907 (Ch. 1796), involved the debtor's assignment of his share of a law partnership's receivables to repay a debt shortly before the debtor was declared bankrupt. Other creditors petitioned chancery for an order directing the debtor's law partner to hand over for general distribution among creditors the debtor's current and future shares of the partnership's receivables, which he held in trust for the assignee. The Chancellor refused to do so, finding the proposal inequitable. Instead, he directed the creditors to bring an action at law against the assignee if they thought themselves enti-

tled to relief. Although this case demonstrates that fraudulent conveyance actions could be brought in equity, it does not show that suits to recover a definite sum of money would be decided by a court of equity when a petitioner did not seek distinctively equitable remedies. The creditors in *Ex parte Scudamore* asked the Chancellor to provide injunctive relief by ordering the debtor's former law partner to convey to them the debtor's share of the partnership's receivables that came into his possession in the future, along with receivables he then held in trust for the debtor. To the extent that they asked the court to order relinquishment of a specific preferential transfer rather than ongoing equitable relief, the Chancellor dismissed their suit and noted that the proper means of recovery would be an action at law against the transferee. Respondent's own cause of action is of precisely that sort.

Hobbs v. *Hull*, 1 Cox 445, 29 Eng. Rep. 1242 (Ch. 1788), also fails to advance respondent's case. The assignees in bankruptcy there sued to set aside an alleged fraudulent conveyance of real estate in trust by a husband to his wife, in return for her relinquishment of a cause of action in divorce upon discovering his adultery. The court dismissed the suit, finding that the transfer was not fraudulent, and allowed the assignees to bring an ejectment or other legal action in the law courts. The salient point is that the bankruptcy assignees sought the traditional equitable remedy of setting aside a conveyance of land in trust, rather than the recovery of money or goods, and that the court refused to decide their legal claim to ejectment once it had ruled that no equitable remedy would lie. The court's sweeping statement that "Courts of Equity have most certainly been in the habit of exercising a concurrent jurisdiction with the Courts of Law on the statutes of *Elizabeth* respecting fraudulent conveyances," *id.*, at 445–446, 30 Eng. Rep., at 1242, is not supported by reference to any cases that sought the recovery of a fixed sum of money without the need for an accounting or

other equitable relief. Nor has respondent repaired this deficit.[5] We therefore conclude that respondent would have had to bring his action to recover an alleged fraudulent con-

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[5] Rather than list 18th-century English cases to support the contention that fraudulent monetary transfers were traditionally cognizable in equity, respondent cites three recent cases from the Courts of Appeals. These cases, however, weaken rather than bolster respondent's argument. *In re Graham*, 747 F. 2d 1383 (CA11 1984), held that there was no Seventh Amendment jury trial right in a suit for the *equitable* remedy of setting aside an alleged fraudulent conveyance of *real estate* by a bankrupt. With respect to suits like respondent's, the court expressly noted that "an action by a creditor or trustee-in-bankruptcy seeking money damages is an action at law." *Id.*, at 1387 (citations omitted). *Damsky* v. *Zavatt*, 289 F. 2d 46 (CA2 1961), also involved a conveyance of real estate. And there, too, the court acknowledged that jury trials are ordinarily available with respect to monetary claims. See *id.*, at 54.

Both of these holdings are questionable, moreover, to the extent that they are in tension with our decision in *Whitehead* v. *Shattuck*, 138 U. S. 146 (1891). Although there is scholarly support for the claim that actions to recover real property are quintessentially equitable actions, see 1 G. Glenn, Fraudulent Conveyances and Preferences § 98, pp. 183–184 (rev. ed. 1940), in *Whitehead* we stated:

"[W]here an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury." 138 U. S., at 151.

See also *Pernell* v. *Southall Realty*, 416 U. S. 363, 370–374 (1974).

Finally, respondent misreads *In re Harbour*, 840 F. 2d 1165, 1172–1173 (1988). The Fourth Circuit relied in that case on the same authorities to which we have referred, distinguishing between suits to recover fraudulent transfers and other bankruptcy proceedings. The court's holding that the Seventh Amendment right to a jury trial no longer extends to such actions was based not on its historical analysis, which accords with our own, but on its erroneous belief that Congress possesses the power to assign jurisdiction over all fraudulent conveyance actions to bankruptcy courts sitting without juries. The case therefore lends no support to respondent's historical argument.

veyance of a determinate sum of money at law in 18th-century England, and that a court of equity would not have adjudicated it.[6]

B

The nature of the relief respondent seeks strongly supports our preliminary finding that the right he invokes should be denominated legal rather than equitable. Our decisions establish beyond peradventure that "[i]n cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of

[6] Citing several authorities, JUSTICE WHITE contends that "[o]ther scholars have looked at the same history and come to a different conclusion." *Post*, at 85, and n. 7. This assertion, however, lacks the support it claims. With the exception of Justice Gray's opinion in *Drake* v. *Rice*, 130 Mass. 410, 412 (1881), and Roberts' treatise, none of the authorities cited so much as mentions 18th-century English practice. Although Collier offers as its opinion that actions to set aside fraudulent transfers are equitable in nature, 4 Collier on Bankruptcy ¶ 548.10, p. 548–125 (15th ed. 1989), it refers only to recent cases in defending its opinion, while acknowledging that some courts have disagreed. Bump and Wait both limit their citations to state-court decisions, refusing to analyze earlier English cases. See O. Bump, Conveyances Made by Debtors to Defraud Creditors § 532 (4th ed. 1896); F. Wait, Fraudulent Conveyances and Creditors' Bills §§ 56–60 (1884). To be sure, in *Drake* v. *Rice*, 130 Mass., at 412, Justice Gray says that, "[b]y the law of England before the American Revolution, . . . fraudulent conveyances of choses in action, though not specified in the statute [of Elizabeth], were equally void, but from the nature of the subject the remedy of the creditor must be sought in equity." But the reason why suits to recover fraudulent transfers of choses in action had to be brought in equity, Justice Gray points out, is that they could not be attached or levied upon. *Id.*, at 413. See also O. Bump, *supra*, § 531 ("[T]here is no remedy at law when the property can not be taken on execution or by attachment"). Justice Gray's summary of 18th-century English practice does not extend to cases, such as those involving monetary transfers, where an adequate remedy existed at law. The passage JUSTICE WHITE cites from Roberts' treatise is obscure, and does not speak squarely to the question whether 18th-century English courts of equity would hear cases where legal remedies were sufficient. See W. Roberts, Voluntary and Fraudulent Conveyances 526–527 (3d Am. ed. 1845).

damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received." *Buzard* v. *Houston*, 119 U. S., at 352, citing *Parkersburg* v. *Brown*, 106 U. S. 487, 500 (1883); *Ambler* v. *Choteau*, 107 U. S. 586 (1883); *Litchfield* v. *Ballou*, 114 U. S. 190 (1885). See also *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 454, n. 11 (1977) ("the otherwise legal issues of voidable preferences"); *Pernell* v. *Southall Realty*, 416 U. S. 363, 370 (1974) ("'[W]here an action is simply for the recovery . . . of a money judgment, the action is one at law'"), quoting *Whitehead* v. *Shattuck*, 138 U. S. 146, 151 (1891); *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 476 (1962) ("Petitioner's contention . . . is that insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal. We agree with that contention"); *Gaines* v. *Miller*, 111 U. S. 395, 397–398 (1884) ("Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. The remedy at law is adequate and complete") (citations omitted).

Indeed, in our view *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92 (1932), removes all doubt that respondent's cause of action should be characterized as legal rather than as equitable. In *Schoenthal*, the trustee in bankruptcy sued in equity to recover alleged preferential payments, claiming that it had no adequate remedy at law. As in this case, the recipients of the payments apparently did not file claims against the bankruptcy estate. The Court held that the suit had to proceed at law instead, because the long-settled rule that suits in equity will not be sustained where a complete remedy exists at law, then codified at 28 U. S. C. § 384, "serves to guard the right of trial by jury preserved by the Seventh Amendment and to that end it should be liberally construed." 287 U. S., at 94. The Court found that the trustee's suit—indistinguishable from respondent's suit in all relevant respects—could not go forward in equity because an adequate remedy

was available at law. There, as here, "[t]he preferences sued for were money payments of ascertained and definite amounts," and "[t]he bill discloses no facts that call for an accounting or other equitable relief." *Id.*, at 95. Respondent's fraudulent conveyance action plainly seeks relief traditionally provided by law courts or on the law side of courts having both legal and equitable dockets.[7] Unless Congress may and has permissibly withdrawn jurisdiction over that action by courts of law and assigned it exclusively to non-Article III tribunals sitting without juries, the Seventh Amendment guarantees petitioners a jury trial upon request.

IV

Prior to passage of the Bankruptcy Reform Act of 1978, Pub. L. 95–598, 92 Stat. 2549 (1978 Act), "[s]uits to recover preferences constitute[d] no part of the proceedings in bank-

[7] Respondent claims to seek "avoidance" of the allegedly fraudulent transfers and restitution of the funds that were actually transferred, but maintains that petitioners have made restitution impossible because the transferred funds cannot be distinguished from the other dollars in petitioners' bank accounts. See Brief for Respondent 39–44. Because avoidance and restitution are classical equitable remedies, he says, petitioners are not entitled to a trial by jury. We find this strained attempt to circumvent precedent unpersuasive. Because dollars are fungible, and respondent has not requested an accounting or other specifically equitable form of relief, a complete remedy is available at law, and equity will not countenance an action when complete relief may be obtained at law. See, *e. g.*, *Schoenthal* v. *Irving Trust Co.*, 287 U. S., at 94–95. Moreover, because a plaintiff is entitled to return of any funds transferred in violation of 11 U. S. C. § 548 (1982 ed., Supp. V), and because a judge lacks equitable discretion to refuse to enter an award for less than the amount of the transfer, any distinction that might exist between "damages" and monetary relief under a different label is purely semantic, with no relevance to the adjudication of petitioners' Seventh Amendment claim. Cf. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 442–443 (1975) (REHNQUIST, J., concurring). Indeed, even if the checks respondent seeks to recover lay untouched in petitioners' offices, legal remedies would apparently have sufficed. See, *e. g.*, *Adams* v. *Champion*, 294 U. S. 231, 234 (1935); *Whitehead* v. *Shattuck*, 138 U. S., at 151.

ruptcy." *Schoenthal* v. *Irving Trust Co.*, *supra*, at 94–95. Although related to bankruptcy proceedings, fraudulent conveyance and preference actions brought by a trustee in bankruptcy were deemed separate, plenary suits to which the Seventh Amendment applied. While the 1978 Act brought those actions within the jurisdiction of the bankruptcy courts, it preserved parties' rights to trial by jury as they existed prior to the effective date of the 1978 Act. 28 U. S. C. § 1480(a) (repealed). The 1984 Amendments, however, designated fraudulent conveyance actions "core proceedings," 28 U. S. C. § 157(b)(2)(H) (1982 ed., Supp. V), which bankruptcy judges may adjudicate and in which they may issue final judgments, § 157(b)(1), if a district court has referred the matter to them, § 157(a). We are not obliged to decide today whether bankruptcy courts may conduct jury trials in fraudulent conveyance suits brought by a trustee against a person who has not entered a claim against the estate, either in the rare procedural posture of this case, see *supra*, at 41, n. 3, or under the current statutory scheme, see 28 U. S. C. § 1411 (1982 ed., Supp. V). Nor need we decide whether, if Congress has authorized bankruptcy courts to hold jury trials in such actions, that authorization comports with Article III when non-Article III judges preside over the actions subject to review in, or withdrawal by, the district courts. We also need not consider whether jury trials conducted by a bankruptcy court would satisfy the Seventh Amendment's command that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," given that district courts may presently set aside clearly erroneous factual findings by bankruptcy courts. Bkrtcy. Rule 8013. The sole issue before us is whether the Seventh Amendment confers on petitioners a right to a jury trial in the face of Congress' decision to allow a non-Article III tribunal to adjudicate the claims against them.

A

In *Atlas Roofing*, we noted that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'" 430 U. S., at 455 (footnote omitted). We emphasized, however, that Congress' power to block application of the Seventh Amendment to a cause of action has limits. Congress may only deny trials by jury in actions at law, we said, in cases where "public rights" are litigated: "Our prior cases support administrative factfinding in only those situations involving 'public rights,' *e. g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated." *Id.*, at 458.[8]

We adhere to that general teaching. As we said in *Atlas Roofing:* "'On the common law side of the federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself.'" *Id.*, at 450, n. 7, quoting *Crowell* v. *Benson*, 285 U. S. 22, 51 (1932). Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders.[9] But it lacks the power to strip parties

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[8] Although we left the term "public rights" undefined in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S., at 450, 458, we cited *Crowell* v. *Benson*, 285 U. S. 22 (1932), approvingly. In *Crowell*, we defined "private right" as "the liability of one individual to another under the law as defined," *id.*, at 51, in contrast to cases that "arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Id.*, at 50.

[9] This proposition was firmly established in *Atlas Roofing*, *supra*, at 455 (footnote omitted):

contesting matters of private right of their constitutional right to a trial by jury. As we recognized in *Atlas Roofing*, to hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears. 430 U. S., at 457–458. The Constitution nowhere grants Congress such puissant authority. "[L]egal claims are not magically converted into equitable issues by their presentation to a court of equity," *Ross* v. *Bernhard*, 396 U. S. 531, 538 (1970), nor can Congress conjure away the Seventh Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal.

In certain situations, of course, Congress may fashion causes of action that are closely *analogous* to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable. See, *e. g.*, *Atlas Roofing*, *supra*, at 450–461 (workplace safety regulations); *Block* v. *Hirsh*, 256 U. S. 135, 158 (1921) (temporary emergency regulation of rental real estate). See also *Pernell* v. *Southall Realty*, 416 U. S., at 382–383 (discussing cases); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856) (Congress "may or may not bring within the cognizance of the courts of the United States, as it may deem proper," matters involving public rights). Congress' power to do so is limited, however, just as its power to place adjudicative authority in non-Article III tribunals is circumscribed. See *Thomas* v.

"Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency."

Union Carbide Agricultural Products Co., 473 U. S. 568, 589, 593–594 (1985); *id.*, at 598–600 (BRENNAN, J., concurring in judgment); *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 73–76 (1982) (opinion of BRENNAN, J.); *id.*, at 91 (REHNQUIST, J., concurring in judgment). Unless a legal cause of action involves "public rights," Congress may not deprive parties litigating over such a right of the Seventh Amendment's guarantee to a jury trial.

In *Atlas Roofing*, *supra*, at 458, we noted that Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity. Our case law makes plain, however, that the class of "public rights" whose adjudication Congress may assign to administrative agencies or courts of equity sitting without juries is more expansive than *Atlas Roofing*'s discussion suggests. Indeed, our decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal. For if a statutory cause of action, such as respondent's right to recover a fraudulent conveyance under 11 U. S. C. §548(a)(2), is not a "public right" for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking "the essential attributes of the judicial power." *Crowell* v. *Benson*, *supra*, at 51. And if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the

Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder. See, *e. g.*, *Atlas Roofing*, *supra*, at 453–455, 460; *Pernell* v. *Southall Realty*, *supra*, at 383; *Block* v. *Hirsh*, *supra*, at 158. In addition to our Seventh Amendment precedents, we therefore rely on our decisions exploring the restrictions Article III places on Congress' choice of adjudicative bodies to resolve disputes over statutory rights to determine whether petitioners are entitled to a jury trial.

In our most recent discussion of the "public rights" doctrine as it bears on Congress' power to commit adjudication of a statutory cause of action to a non-Article III tribunal, we rejected the view that "a matter of public rights must at a minimum arise 'between the government and others.'" *Northern Pipeline Construction Co.*, *supra*, at 69 (opinion of BRENNAN, J.), quoting *Ex parte Bakelite Corp.*, 279 U. S. 438, 451 (1929). We held, instead, that the Federal Government need not be a party for a case to revolve around "public rights." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S., at 586; *id.*, at 596–599 (BRENNAN, J., concurring in judgment). The crucial question, in cases not involving the Federal Government, is whether "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id.*, at 593–594. See *id.*, at 600 (BRENNAN, J., concurring in judgment) (challenged provision involves public rights because "the dispute arises in the context of a federal regulatory scheme that virtually occupies the field"). If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government,

then it must be adjudicated by an Article III court.[10] If the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial.

B

Although the issue admits of some debate, a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U. S. C. §548(a)(2) seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions. In *Northern Pipeline Construction Co.*, 458 U. S., at 71, the plurality noted

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[10] In *Atlas Roofing*, 430 U. S., at 442, 450, n. 7, we stated that "[i]n cases which do involve only 'private rights,' this Court has accepted factfinding by an administrative agency, without intervention by a jury, only as an adjunct to an Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of the special master." That statement, however, must be read in context. First, we referred explicitly only to Congress' power, where disputes concern private rights, to provide administrative factfinding instead of jury trials in *admiralty* cases. Civil causes of action in admiralty, however, are not suits at common law for Seventh Amendment purposes, and thus no constitutional right to a jury trial attaches. *Waring* v. *Clarke*, 5 How. 441, 460 (1847). Second, our statement should not be taken to mean that Congress may assign at least the initial factfinding in all cases involving controversies entirely between private parties to administrative agencies or other tribunals not involving juries, so long as they are established as adjuncts to Article III courts. If that were so, Congress could render the Seventh Amendment a nullity. Rather, that statement, citing *Crowell* v. *Benson*, 285 U. S., at 51–65, means only that in *some* cases involving "private rights" *as that term was defined in* Crowell *and used in* Atlas Roofing—namely, as encompassing all disputes to which the Federal Government is not a party in its sovereign capacity—may Congress dispense with juries as factfinders through its choice of an adjudicative forum. Those cases in which Congress may decline to provide jury trials are ones involving statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency or specialized court of equity. Whatever terminological distinctions *Atlas Roofing* may have suggested, we now refer to those rights as "public" rather than "private."

that the restructuring of debtor-creditor relations in bankruptcy "may well be a 'public right.'"[11] But the plurality also emphasized that state-law causes of action for breach of contract or warranty are paradigmatic private rights, even when asserted by an insolvent corporation in the midst of Chapter 11 reorganization proceedings. The plurality further said that "matters from their nature subject to 'a suit at common law or in equity or admiralty'" lie at the "protected core" of Article III judicial power, *id.*, at 71, n. 25; see *id.*, at 90 (REHNQUIST, J., concurring in judgment)—a point we reaffirmed in *Thomas*, *supra*, at 587. There can be little doubt that fraudulent conveyance actions by bankruptcy trustees—suits which, we said in *Schoenthal* v. *Irving Trust Co.*, 287 U. S., at 94–95 (citation omitted), "constitute no part of the proceedings in bankruptcy but concern controversies arising out of it"—are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res. See Gibson 1022–1025. They therefore appear matters of private rather than public right.[12]

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[11] We do not suggest that the restructuring of debtor-creditor relations is in fact a public right. This thesis has met with substantial scholarly criticism, see, *e. g.*, Gibson 1041, n. 347; Currie, Bankruptcy Judges and the Independent Judiciary, 16 Creighton L. Rev. 441, 452 (1983); Baird, Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon, 1982 Sup. Ct. Rev. 25, 44, and we need not and do not seek to defend it here. Our point is that even if one accepts this thesis, the Seventh Amendment entitles petitioners to a jury trial.

[12] See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 71 (1982) (opinion of BRENNAN, J.):

"[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a 'public right,' but the latter obviously is not."

Our decision in *Katchen* v. *Landy*, 382 U. S. 323 (1966), under the Seventh Amendment rather than Article III, confirms this analysis. Petitioner, an officer of a bankrupt corporation, made payments from corporate funds within four months of bankruptcy on corporate notes on which he was an accommodation maker. When petitioner later filed claims against the bankruptcy estate, the trustee counterclaimed, arguing that the payments petitioner made constituted voidable preferences because they reduced his potential personal liability on the notes. We held that the bankruptcy court had jurisdiction to order petitioner to surrender the preferences and that it could rule on the trustee's claim without according petitioner a jury trial. Our holding did not depend, however, on the fact that "[bankruptcy] courts are essentially courts of equity" because "they characteristically proceed in summary fashion to deal with the assets of the bankrupt they are administering." *Id.*, at 327. Notwithstanding the fact that bankruptcy courts "characteristically" supervised summary proceedings, they were statutorily invested with jurisdiction at law as well, and could also oversee plenary proceedings. See *Atlas Roofing*, 430 U. S., at 454, n. 11 (*Katchen* rested "on the ground that a bankruptcy court, *exercising its summary jurisdiction*, was a specialized court of equity") (emphasis added); *Pepper* v. *Litton*, 308 U. S. 295, 304 (1939) ("*[F]or many purposes* 'courts of bankruptcy are essentially courts of equity'") (emphasis added). Our decision turned, rather, on the bankruptcy court's having "actual or constructive possession" of the bankruptcy estate, 382 U. S., at 327, and its power and obligation to consider objections by the trustee in deciding whether to allow claims against the estate. *Id.*, at 329–331. Citing *Schoenthal* v. *Irving Trust Co.*, *supra*, approvingly, we expressly stated that, if petitioner had not submitted a claim to the bankruptcy court, the trustee could have recovered the preference only by a plenary action, and that petitioner would have

been entitled to a jury trial if the trustee had brought a plenary action in federal court. See 382 U. S., at 327–328. We could not have made plainer that our holding in *Schoenthal* retained its vitality: "[A]lthough petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92, when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity." *Id.*, at 336.[13]

Unlike JUSTICE WHITE, see *post*, at 72–75, 78, we do not view the Court's conclusion in *Katchen* as resting on an accident of statutory history. We read *Schoenthal* and *Katchen* as holding that, under the Seventh Amendment, a creditor's right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate, not upon Congress' precise definition of the "bankruptcy estate" or upon whether Congress chanced to deny jury trials to creditors who have not filed claims and who are sued by a trustee to recover an alleged preference. Because petitioners here, like the petitioner in *Schoenthal*, have not filed claims against the estate, respondent's fraudulent conveyance action does not arise "as part of the process of allowance and disallowance of claims." Nor is that action integral to the restructuring of debtor-creditor relations. Congress therefore cannot divest petitioners of

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[13] Although we said in *Katchen* v. *Landy*, 382 U. S., at 336, that the petitioner *might* have been entitled to a jury trial had he presented no claim against the bankruptcy estate, our approving references not only to *Schoenthal* but also to *Adams* v. *Champion*, 294 U. S., at 234, and *Buffum* v. *Barceloux Co.*, 289 U. S. 227, 235–236 (1933), see 382 U. S., at 327–328, demonstrate that we did not intend to cast doubt on the proposition that the petitioner in *Katchen* would have been entitled to a jury trial had he not entered a claim against the estate and had the bankruptcy trustee requested solely legal relief. We merely left open the possibility that a jury trial might not be required because in some cases preference avoidance actions are equitable in character.

their Seventh Amendment right to a trial by jury. *Katchen* thus supports the result we reach today; it certainly does not compel its opposite.[14]

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[14] In *Katchen*, *supra*, at 335, we adopted a rationale articulated in *Alexander* v. *Hillman*, 296 U. S. 222, 241–242 (1935) (citations omitted):

"'By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance . . . .

. . . . . .

"'Respondents' contention means that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivers reasonably may insist that, before taking aught, respondents may by the receivership court be required to make restitution. That requirement is in harmony with the rule generally followed by courts of equity that having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief.'"

It warrants emphasis that this rationale differs from the notion of waiver on which the Court relied in *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986). The Court ruled in *Schor*—where no Seventh Amendment claims were presented—that the Commodities Futures Trading Commission could adjudicate state-law counterclaims to a federal action by investors against their broker consistent with Article III. The Court reached this conclusion, however, not on the ground that the Commission had possession of a disputed res, to which the investors laid claim, but on the ground that Congress did not require investors to avail themselves of the remedial scheme over which the Commission presided. The investors could have pursued their claims, albeit less expeditiously, in federal court. By electing to use the speedier, alternative procedures Congress had created, the Court said, the investors waived their right to have the state-law counterclaims against them adjudicated by an Article III court. See *id.*, at 847–850. Parallel reasoning is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims. As *Katchen* makes clear, however, by submitting a claim against the bankruptcy estate, creditors subject themselves to the court's equitable power to disallow those claims, even though the debtor's opposing counterclaims are legal in nature and the Seventh Amendment would have entitled creditors to a jury trial had they not tendered claims against the estate.

It hardly needs pointing out that JUSTICE WHITE's assertion, see *post*, at 71–72, that this case is controlled by the Court's statement in *Katchen* that

The 1978 Act abolished the statutory distinction between plenary and summary bankruptcy proceedings, on which the Court relied in *Schoenthal* and *Katchen*. Although the 1978 Act preserved parties' rights to jury trials as they existed prior to the day it took effect, 28 U. S. C. § 1480(a) (repealed), in the 1984 Amendments Congress drew a new distinction between "core" and "non-core" proceedings and classified fraudulent conveyance actions as core proceedings triable by bankruptcy judges. 28 U. S. C. § 157(b)(2)(H) (1982 ed., Supp. V). Whether 28 U. S. C. § 1411 (1982 ed., Supp. V) purports to abolish jury trial rights in what were formerly plenary actions is unclear, and at any rate is not a question we need decide here. See *supra*, at 40–41, n. 3. The decisive point is that in neither the 1978 Act nor the 1984 Amendments did Congress "creat[e] a new cause of action, and remedies therefor, unknown to the common law," because traditional rights and remedies were inadequate to cope with a manifest public problem. *Atlas Roofing*, 430 U. S., at 461. Rather, Congress simply reclassified a preexisting, common-law cause of action that was not integrally related to the reformation of debtor-creditor relations[15] and

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"it makes no difference, so far as petitioner's Seventh Amendment claim is concerned, whether the bankruptcy trustee urges only a § 57g objection or also seeks affirmative relief," 382 U. S., at 337–338, is entirely unfounded. Read in context, the Court's statement merely means that once a creditor has filed a claim against the estate, the bankruptcy trustee may recover the full amount of any preference received by the creditor-claimant, even if that amount exceeds the amount of the creditor's claim. The Court's statement says nothing about a creditor's Seventh Amendment right to a jury trial on a trustee's preference action when the creditor has *not* entered a claim against the estate.

[15] The adventitious relation of a trustee's fraudulent conveyance actions to the reorganization proceedings themselves—which we recognized in *Schoenthal* and *Katchen*, which federal bankruptcy legislation acknowledged until 1978 by treating them as plenary actions when the defendant had not made a claim against the estate, and for which Congress expressly provided jury trial rights until 1984—is further evidenced by the events in this case. Respondent's fraudulent conveyance action was not filed until

that apparently did not suffer from any grave deficiencies. This purely taxonomic change cannot alter our Seventh Amendment analysis. Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity. See Gibson 1022–1025.

Nor can Congress' assignment be justified on the ground that jury trials of fraudulent conveyance actions would "go far to dismantle the statutory scheme," *Atlas Roofing*, 430 U. S., at 454, n. 11, or that bankruptcy proceedings have been placed in "an administrative forum with which the jury would be incompatible." *Id.*, at 450. To be sure, we owe some deference to Congress' judgment after it has given careful consideration to the constitutionality of a legislative provision. See *Northern Pipeline Construction Co.*, 458 U. S., at 61 (opinion of BRENNAN, J.). But respondent has adduced no evidence that Congress considered the constitutional implications of its designation of all fraudulent conveyance actions as core proceedings. Nor can it seriously be argued that permitting jury trials in fraudulent conveyance actions brought by a trustee against a person who has not entered a claim against the estate would "go far to dismantle the statutory scheme," as we used that phrase in *Atlas Roofing*, when our opinion in that case, following *Schoenthal*, plainly assumed that such claims carried with them a right to a jury trial.[16] In addition, one cannot easily say that "the

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well *after* the Bankruptcy Court had approved the plan of reorganization and Chase & Sanborn's tangible assets and business had been liquidated. Reply Brief for Petitioner 9.

[16] Of course, the 1984 Amendments altered the statutory scheme that formed the backdrop to our discussion in *Atlas Roofing*. But in this connection they did so only by depriving persons who have not filed claims against the estate of a statutory right to a jury trial when the trustee sues them to recover an alleged fraudulent conveyance or preferential transfer. The 1984 Amendments did not alter the nature of the trustee's claim or the

jury would be incompatible" with bankruptcy proceedings, in view of Congress' express provision for jury trials in certain actions arising out of bankruptcy litigation. See 28 U. S. C. § 1411 (1982 ed., Supp. V); Gibson 1024–1025; Warner, *Katchen* Up in Bankruptcy: The New Jury Trial Right, 63 Am. Bankr. L. J. 1, 48 (1989) (hereinafter Warner). And JUSTICE WHITE's claim that juries may serve usefully as checks only on the decisions of judges who enjoy life tenure, see

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relief to which he was entitled. To say that our failure to respect Congress' reclassification of these causes of action would "go far to dismantle the statutory scheme" simply because they partly define the new statutory scheme would be to render this test an empty tautology.

This is not to say, of course, contrary to JUSTICE WHITE's assertion, see *post*, at 75, n. 4, that we regard Congress' amendments to the bankruptcy statutes as an "act of whimsy." The sweeping changes Congress instituted in 1978 were clearly intended to make the reorganization process more efficient, as JUSTICE WHITE's quotation from a Senate Report indicates. But the radical reforms of 1978, on whose legislative history his dissent relies, did not work the slightest alteration in the right to a jury trial of alleged recipients of fraudulent conveyances. That change came in 1984. Although enhanced efficiency was likely Congress' aim once again, neither JUSTICE WHITE nor JUSTICE BLACKMUN points to any statement from the legislative history of the 1984 Amendments confirming this supposition with respect to preference actions in particular. More important, they offer no evidence that Congress considered the propriety of its action under the Seventh Amendment. The House Report cited by JUSTICE BLACKMUN, see *post*, at 93, advocated conferring Article III status on bankruptcy judges. Its favored approach would therefore have eliminated the problem before us by clearly *entitling* petitioners to a jury trial under the Seventh Amendment. See H. R. Rep. No. 98–9, pt. 1, pp. 7, 9, 16 (1983). This approach was rejected by the Senate. In defending an alternative proposal that ultimately prevailed, however, the Senate Report to which JUSTICE BLACKMUN refers neglects to discuss specifically the inclusion of preference actions in the class of core proceedings or potential difficulties under the Seventh Amendment to which that assignment might give rise. See S. Rep. No. 98–55, pp. 32–40 (1983). Apparently, the Senate Judiciary Committee overlooked this problem entirely. Thus, the 1984 Amendments' denial of the right to a jury trial in preference and fraudulent conveyance actions can hardly be said to represent Congress' considered judgment of the constitutionality of this change.

post, at 82–83, overlooks the extent to which judges who are appointed for fixed terms may be beholden to Congress or Executive officials, and thus ignores the potential for juries to exercise beneficial restraint on their decisions.

It may be that providing jury trials in some fraudulent conveyance actions—if not in this particular case, because respondent's suit was commenced after the Bankruptcy Court approved the debtor's plan of reorganization—would impede swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations.[17] But "these considerations are insufficient to overcome the clear command of the Seventh Amendment." *Curtis* v. *Loether*, 415 U. S., at 198. See also *Bowsher* v. *Synar*, 478 U. S. 714, 736 (1986) ("'[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution'"), quoting *INS* v. *Chadha*, 462 U. S. 919, 944 (1983); *Pernell* v. *Southall Realty*, 416 U. S., at 383–384 (discounting arguments that jury trials would be unduly burdensome and rejecting "the notion that there is some necessary

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[17] Respondent argues, for example, that the prompt resolution of fraudulent transfer claims brought by bankruptcy trustees is often crucial to the reorganization process and that if, by demanding a jury trial, a party could delay those proceedings, it could alter the negotiating framework and unfairly extract more favorable terms for itself. Brief for Respondent 35. It warrants notice, however, that the provision of jury trials in fraudulent conveyance actions has apparently not been attended by substantial difficulties under previous bankruptcy statutes; that respondent has not pointed to any discussion of this allegedly serious problem in the legislative history of the 1978 Act or the 1984 Amendments; that in many cases defendants would likely not request jury trials; that causes of action to recover preferences may be assigned pursuant to the plan of reorganization rather than pursued prior to the plan's approval, as was done in this very case; and that Congress itself, in enacting 28 U. S. C. § 1411 (1982 ed., Supp. V), explicitly provided for jury trials of personal injury and wrongful-death claims, which would likely take much longer to try than most preference actions and which often involve large sums of money.

inconsistency between the desire for speedy justice and the right to jury trial").[18]

V

We do not decide today whether the current jury trial provision—28 U. S. C. § 1411 (1982 ed., Supp. V)—permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions like the one respondent initiated. Nor do we express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts pursuant to the 1984 Amendments. We leave those issues for future decisions.[19] We do hold, however, that whatever the answers to these questions, the Seventh Amendment entitles petitioners to the jury trial they requested. Accordingly, the judgment of

[18] One commentator has noted:

"[T]he interpretation of *Katchen* as a 'delay and expense' exception to the seventh amendment is negated by the Court's rejection of the argument that delay, or even the more significant problem of jury prejudice, can override the seventh amendment. *Katchen*'s reference to 'delay and expense' must, therefore, be read as part of the Court's consideration of whether the legal remedy had become sufficiently adequate to result in a shifting of the boundaries of law and equity. At a minimum, the delay and expense language of *Katchen* must be read in light of the petitioner's demand for a stay of the bankruptcy action and the institution of a separate suit in a different court. That is a qualitatively different type of delay and expense from the delay and expense of providing a jury trial in the same action. The latter could never override *Beacon* [*Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959),] and *Dairy Queen*[, *Inc.* v. *Wood*, 369 U. S. 469 (1962)]." Warner 39 (footnotes omitted); see *id.*, at 42, 48.

[19] JUSTICE WHITE accuses us of being "rather coy" about which statute we are invalidating, *post*, at 71, n. 2, and of "preferring to be obtuse" about which court must preside over the jury trial to which petitioners are entitled. *Post*, at 81. But however helpful it might be for us to adjudge every pertinent statutory and constitutional issue presented by the 1978 Act and the 1984 Amendments, we cannot properly reach out and decide matters not before us. The only question we have been called upon to answer in this case is whether the Seventh Amendment grants petitioners a right to a jury trial. We hold unequivocally that it does.

the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join all but Part IV of the Court's opinion. I make that exception because I do not agree with the premise of its discussion: that "the Federal Government need not be a party for a case to revolve around 'public rights.'" *Ante*, at 54, quoting *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 586 (1985). In my view a matter of "public rights," whose adjudication Congress may assign to tribunals lacking the essential characteristics of Article III courts, "must at a minimum arise 'between the government and others.'" *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 69 (1982) (plurality opinion), quoting *Ex parte Bakelite Corp.*, 279 U. S. 438, 451 (1929). Until quite recently this has also been the consistent view of the Court. See 458 U. S., at 69, n. 23 ("[T]he presence of the United States as a proper party . . . is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights'"); *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 450 (1977) (public rights cases are "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes"); *id.*, at 457 (noting "distinction between cases of private right and those which arise between the Government and persons subject to its authority"); *id.*, at 458 (situations involving "public rights" are those "where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights"); *Crowell* v. *Benson*, 285 U. S. 22, 50–51 (1932) (public rights are "those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative depart-

ments"); *Ex parte Bakelite Corp.*, *supra*, at 451 (public rights are those "arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it"); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 283 (1856) (plaintiff's argument that a controversy susceptible of judicial determination must be a "judicial controversy" heard in an Article III court "leaves out of view the fact that the United States is a party").

The notion that the power to adjudicate a legal controversy between two private parties may be assigned to a non-Article III, yet federal, tribunal is entirely inconsistent with the origins of the public rights doctrine. The language of Article III itself, of course, admits of no exceptions; it directs unambiguously that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." In *Murray's Lessee*, *supra*, however, we recognized a category of "public rights" whose adjudication, though a judicial act, Congress may assign to tribunals lacking the essential characteristics of Article III courts. That case involved the Act of May 15, 1820, 3 Stat. 592, which established a summary procedure for obtaining from collectors of federal revenue funds that they owed to the Treasury. Under that procedure, after a federal auditor made the determination that the funds were due, a "distress warrant" would be issued by the Solicitor of the Treasury, authorizing a United States marshal to seize and sell the personal property of the collector, and to convey his real property, in satisfaction of the debt. The United States' lien upon the real property would be effective upon the marshal's filing of the distress warrant in the district court of the district where the property was located. The debtor could, however, bring a challenge to the distress warrant in any United States district court, in which judicial challenge "every fact upon which the legality of the extra-judicial remedy depends may be drawn in[to] ques-

tion," 18 How., at 284. *Murray's Lessee* involved a dispute over title to lands that had been owned by a former collector of customs whom the Treasury auditor had adjudged to be deficient in his remittances. The defendant had purchased the land in the marshal's sale pursuant to a duly issued distress warrant (which had apparently not been contested by the collector in any district court proceeding). The plaintiff, who had acquired the same land pursuant to the execution of a judgment against the collector, which execution occurred *before* the marshal's sale, but *after* the marshal's filing of the distress warrant to establish the lien, brought an action for ejectment to try title. He argued, *inter alia*, that the process by which the defendant had obtained title violated Article III because adjudication of the collector's indebtedness to the United States was inherently a judicial act, and could not lawfully have been performed by a Treasury auditor, but only by an Article III court. We rejected this contention by observing that although "the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act," *id.*, at 280, the English and American traditions established that it did not, without consent of Congress, give rise to a judicial "controversy" within the meaning of Article III.

It was in the course of answering the plaintiff's rejoinder to this holding that we uttered the words giving birth to the public rights doctrine. The plaintiff argued that if we were correct that the matter was "not in its nature a judicial controversy, congress could not make it such, nor give jurisdiction over it to the district courts" in the bills permitted to be filed by collectors challenging distress warrants—so that "the fact that congress has enabled the district court to pass upon it, is conclusive evidence that it is a judicial controversy." *Id.*, at 282. That argument, we said, "leaves out of view the fact that the United States is a party." *Id.*, at 283. Unlike a private party who acts extrajudicially to recapture his property, the marshal who executes a distress warrant "can-

not be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its own consent," even though the issue in question is an appropriate matter for a judicial controversy. *Ibid.* Congress could, however, waive this immunity, so as to permit challenges to the factual bases of officers' actions in Article III courts; and this waiver did not have to place the proceeding in the courts unconditionally or *ab initio*, for the "United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just." *Ibid.* Thus, we summed up, in the oft-quoted passage establishing the doctrine at issue here:

> [T]here are matters, *involving public rights*, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.*, at 284 (emphasis added).

It is clear that what we meant by public rights were not rights important to the public, or rights created by the public, but rights *of the public*—that is, rights pertaining to claims brought by or against the United States. For central to our reasoning was the device of waiver of sovereign immunity, as a means of converting a subject which, though its resolution involved a "judicial act," could not be brought before the courts, into the stuff of an Article III "judicial controversy." Waiver of sovereign immunity can only be implicated, of course, in suits where the Government is a party. We understood this from the time the doctrine of public rights was born, in 1856, until two Terms ago, saying as recently as 1982 that the suits to which it applies "must at a minimum arise 'between the government and others,'" *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S., at 69, quoting *Ex parte Bakelite Corp.*, 279

U. S., at 451. See also, in addition to the cases cited *supra*, at 65–66, *Williams* v. *United States*, 289 U. S. 553, 581 (1933) (noting sovereign immunity origins of legislative courts); *Ex parte Bakelite*, *supra*, at 453–454 (same). Cf. *McElrath* v. *United States*, 102 U. S. 426, 440 (1880).

In *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568 (1985), however, we decided to interpret the phrase "public rights" as though it had not been developed in the context just discussed and did not bear the meaning just described. We pronounced, as far as I can tell by sheer force of our office, that it applies to a right "so closely *integrated into a public regulatory scheme* as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id.*, at 593–594 (emphasis added). The doctrine reflects, we announced, "simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced," *id.*, at 589, quoting *Northern Pipeline*, *supra*, at 68—without pointing out, as had *Murray's Lessee*, that the only adjudications of private rights that "could be conclusively determined by the Executive and Legislative Branches" were a select category of private rights vis-à-vis the Government itself. We thus held in *Thomas*, for the first time, that a purely private federally created action did not require Article III courts.

There was in my view no constitutional basis for that decision. It did not purport to be faithful to the origins of the public rights doctrine in *Murray's Lessee;* nor did it replace the careful analysis of that case with some other reasoning that identifies a discrete category of "judicial acts" which, at the time the Constitution was adopted, were not thought to implicate a "judicial controversy." The lines sought to be established by the Constitution did not matter. "Pragmatic understanding" was all that counted—in a case-by-case evaluation of whether the danger of "encroaching" on the "judi-

cial powers" (a phrase now drained of constant content) is too much. The Term after *Thomas*, in *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986), we reconfirmed our error, embracing the analysis of *Thomas* and describing at greater length the new Article III standard it established, which seems to me no standard at all:

> "[I]n reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. . . . Among the factors upon which we have focused are the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III." 478 U. S., at 851, citing *Thomas*, *supra*, at 587, 589–593.

I do not think one can preserve a system of separation of powers on the basis of such intuitive judgments regarding "practical effects," no more with regard to the assigned functions of the courts, see *Mistretta* v. *United States*, 488 U. S. 361, 426–427 (1989) (SCALIA, J., dissenting), than with regard to the assigned functions of the Executive, see *Morrison* v. *Olson*, 487 U. S. 654, 708–712 (1988) (SCALIA, J., dissenting). This central feature of the Constitution must be anchored in rules, not set adrift in some multifactored "balancing test"—and especially not in a test that contains as its last and most revealing factor "the concerns that drove Congress to depart from the requirements of Article III." *Schor*, *supra*, at 851.

I would return to the longstanding principle that the public rights doctrine requires, at a minimum, that the United States be a party to the adjudication. On that basis, I concur in the Court's conclusion in Part IV of its opinion that

the Article III concomitant of a jury trial could not be eliminated here. Since I join the remainder of the Court's opinion, I concur in its judgment as well.

JUSTICE WHITE, dissenting.

The Court's decision today calls into question several of our previous decisions,[1] strikes down at least one federal statute,[2] and potentially concludes for the first time that the Seventh Amendment[3] guarantees litigants in a specialized non-Article III forum the right to a jury trial. Because I cannot accept these departures from established law, I respectfully dissent.

I

Before I explore the Court's approach to analyzing the issues presented in this case, I first take up the question of the

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[1] As I will discuss more fully below, the Court's opinion can be read as overruling or severely limiting the relevant portions of the following cases: *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442 (1977); *Katchen* v. *Landy*, 382 U. S. 323 (1966); *Block* v. *Hirsh*, 256 U. S. 135 (1921); and *Barton* v. *Barbour*, 104 U. S. 126 (1881), plus perhaps some others.

[2] Like much else about its opinion, the Court is rather coy about disclosing which federal statute it is invalidating today. Perhaps it is 28 U. S. C. § 157(b)(2)(H) (1982 ed., Supp. V), the statute which includes actions to avoid or recover fraudulent conveyances among core bankruptcy proceedings; or § 157(b)(1), which permits bankruptcy judges to enter final judgments in core proceedings (given the inclusion of fraudulent conveyance actions among these proceedings); or perhaps it is 28 U. S. C. § 1411(b) (1982 ed., Supp. V), limiting jury trial rights in bankruptcy; or perhaps some part of Title 11 itself—or some combination of the above.

There is no way for Congress, or the lower Article III courts, or the bankruptcy courts—or creditors or debtors for that matter—to know how they are expected to respond to the Court's decision, even if they wish to be diligent in conforming their behavior to today's mandate. See especially Part V, *ante*, at 64. Though the Court denies that it is being "coy" or "obtuse," it steadfastly refuses to the end to disclose which statute it finds unconstitutional today. See *ante*, at 64, n. 19.

[3] The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

precedent that the Court most directly disregards today, *Katchen* v. *Landy*, 382 U. S. 323 (1966). Though the Court professes not to overrule this decision, and curiously, to be acting in reliance on it, see *ante*, at 57–59, there is simply no way to reconcile our decision in *Katchen* with what the Court holds today.

In *Katchen*, the petitioner filed a claim in the bankruptcy proceeding to recover funds that he alleged were due to him from a bankrupt estate; respondent, the trustee, resisted paying the claims based on § 57g of the old Bankruptcy Act, which forbade payments to creditors holding "void or voidable" preferences. Petitioner claimed, much as petitioners here do, that the question whether prior payments to him were preferences was a matter that could not be adjudicated without the benefit of a jury trial. We rejected this claim, holding that "there is no Seventh Amendment right to a jury trial" on claims such as Katchen's. *Katchen*, 382 U. S., at 337. Not only could the issue of preference be tried without a jury for the purpose of denying the filed claim pursuant to § 57g, but a money judgment for the amount of the preference could be entered without a jury trial: "[I]t makes no difference, so far as petitioner's Seventh Amendment claim is concerned, whether the bankruptcy trustee urges only a § 57g objection or also seeks affirmative relief." *Id.*, at 337–338. This holding dispositively settles the question before us today: like the petitioner in *Katchen*, petitioners in this case have no Seventh Amendment right to a jury trial when respondent trustee seeks to avoid the allegedly fraudulent transfers they received.

In order to escape the force of *Katchen*'s holding, the Court exploits the circumstances under which that decision was made. Most notably, at the time *Katchen* was decided, the Bankruptcy Act then in force (the 1898 Act) did not include actions to set aside voidable preferences among those proceedings covered by the Act. Thus, the clause of our opinion in *Katchen*, *supra*, at 336, on which the Court today puts so

much weight—"petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee," see *ante*, at 58—simply stated the truism that, under the 1898 Act in force at that time, if petitioner had not presented his claim to the bankruptcy court, that court would have had no jurisdiction to perform a summary adjudication of the preference.

That entitlement, however, on which the Court so heavily relies, was solely the product of the statutory scheme in existence at the time. If it were not, the next phrase appearing in the *Katchen* decision would make little sense: "[W]hen the same issue [*i. e.*, validity of a preference] arises as part of the process of allowance and disallowance of claims, it is triable in equity." *Katchen*, *supra*, at 336. *Katchen* makes it clear that when Congress does commit the issue and recovery of a preference to adjudication in a bankruptcy proceeding, the Seventh Amendment is inapplicable. Only the limits of the 1898 Act prevented this from being the case in *all* instances, and thereby, left Katchen with the possibility of a jury trial right.

Today's Bankruptcy Code is markedly different. Specifically, under the Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Amendments), an action to recover fraudulently transferred property has been classified as a "core" bankruptcy proceeding. See 28 U. S. C. § 157(b)(2)(H) (1982 ed., Supp. V). While in Katchen's day, it was only in special circumstances that adjudicating a preference was committed to bankruptcy proceedings, today, Congress has expressly designated adjudication of a preference or a fraudulent transfer a "core" bankruptcy proceeding. The portion of *Katchen* on which the Court relies—"'petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee,'" see *ante*, at 58—is therefore a relic of history. The same is true of the decision in *Schoen-*

thal v. *Irving Trust Co.*, 287 U. S. 92, 94–95 (1932), which, in holding that "[s]uits to recover preferences constitute no part of the proceedings in bankruptcy," merely reflected the then-existing statutory scheme.

The Court recognizes the distinction between the earlier law and the present Code, but calls the change a "purely taxonomic" one that "cannot alter our Seventh Amendment analysis." *Ante*, at 61. I disagree for two reasons. First, the change is significant because it illustrates the state of the law at the time of *Katchen*, and explains why that case came out as it did. It is hypocritical for the Court to rely on *Katchen*'s statement as to the existence of a jury trial entitlement for the petitioner's claim there, but then dismiss as "taxonomic" the change that wiped out that jury entitlement—or, at the very least, profoundly shifted the basis for it.

More fundamentally, the inclusion of actions to recover fraudulently conveyed property among core bankruptcy proceedings has meaning beyond the taxonomic. As I explain in more detail below, see Part II–A, *infra*, we have long recognized that the forum in which a claim is to be heard plays a substantial role in determining the extent to which a Seventh Amendment jury trial right exists. As we put it in *Katchen:*

> "'[I]n cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods.'" *Katchen*, *supra*, at 337 (quoting *Barton* v. *Barbour*, 104 U. S. 126, 133–134 (1881)).

The same is true here, and it counsels affirmance under our holding in *Katchen*.

In essence, the Court's rejection of *Katchen*—and its classification of the change effected by the 1984 Act as "taxonomic"—comes from its conclusion that the fraudulent conveyance action at issue here is not "'part of the process of allowance and disallowance of claims.'" *Ante*, at 58 (quoting *Katchen*, 382 U. S., at 336). The Court misses *Katchen*'s point, however: it was the fact that *Congress* had committed the determination and recovery of preferences to bankruptcy proceedings that was determinative in that case, not just the bare fact that the action "happened" to take place in the process of adjudicating claims. And the same determinative element is present here, for under the 1984 Amendments, Congress unmistakably intended to have fraudulent conveyances adjudicated and recovered in the bankruptcy court in accordance with that court's usual procedures.

Perhaps in this respect the Court means something more akin to its later restatement of its position; namely, that the 1984 Amendments simply "reclassified a pre-existing, common-law cause of action that was not integrally related to the reformation of debtor-creditor relations." *Ante*, at 60. The Court further indicates that it will pay little heed to the congressional inclusion of avoidance and recovery proceedings in core bankruptcy jurisdiction since that choice was not made "because [Congress found that] traditional rights and remedies were inadequate to cope with a manifest public problem."[4] *Ibid.* This misguided view of the con-

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[4] In addition to the points I make below, I disagree with the Court's portrayal of Congress' expansion of bankruptcy jurisdiction to include actions such as this one as an act of whimsy. In fact, when (in 1978) Congress first swept proceedings like the fraudulent conveyance suit before us into the jurisdiction of the bankruptcy courts, it was legislating out of a sense that "traditional rights and remedies were inadequate to cope with a manifest public problem":

"A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction . . . . [T]he jurisdic-

gressional enactment is the crux of the problem with the Court's approach.

How does the Court determine that an action to recover fraudulently conveyed property is not "integrally related" to the essence of bankruptcy proceedings? Certainly not by reference to a current statutory definition of the core of bank-

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tional limitations presently imposed on the bankruptcy courts have embroiled the court and the parties in voluminous litigation . . . ." S. Rep. No. 95–989, p. 17 (1978).

This rather plain statement by Congress makes it clear that it found the system in place at the time grossly inadequate, and perceived a "manifest public" need for change. See also H. R. Rep. No. 95–595, p. 445 (1977).

In response to this legislative history, the Court makes two points. First, the Court observes that these Reports concerned the 1978 Code, and not the 1984 Amendments; it was the latter, the Court notes, that stripped petitioners of their jury trial right. *Ante*, at 61–62, n. 16. While the Court's analysis is technically correct, it ignores the fact that the 1978 Code undertook—to use the Court's own description—a "radical refor[m]" of bankruptcy law, *ibid.*, including the absorption of fraudulent preference actions into what used to be the plenary jurisdiction of bankruptcy courts. It was this change which laid the groundwork for the post-*Northern Pipeline* Act at issue here.

Second, and more importantly, the Court acknowledges that when Congress adopted the 1984 Amendments, it was motivated by the same "efficiency" concerns that were the basis for the 1978 legislation. *Ante*, at 61–62, n. 16. Thus, the Court concedes the fundamental point that Congress modified the traditional jurisdictional scheme concerning fraudulent conveyance actions because Congress found that this traditional approach was "inadequate to cope with a manifest public problem"; under *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442 (1977)—even under the Court's own description of that case, *ante* at 60—this should suffice to permit Congress to limit jury trial rights on such claims.

Instead of so concluding, however, the Court retreats from *Atlas Roofing* and its earlier analysis, and holds that Congress' enactments do not control here because, in adopting them, Congress failed to make a "considered judgment of the constitutionality of [these] change[s]." *Ante*, at 62, n. 16. As I observe below, *infra*, at 87–88, elevating this inquiry to bellwether status is unprecedented in our Seventh Amendment cases—and unwise.

ruptcy proceedings—enacted by Congress under its plenary constitutional power, see U. S. Const., Art. I, §8, cl. 4, to establish bankruptcy laws. As discussed in the preceding paragraph, this vision of what is "integrally related" to the resolution of creditor-debtor conflicts includes the sort of action before us today. See 28 U. S. C. §157(b)(2)(H) (1982 ed., Supp. V). Nor does the Court find support for its contrary understanding in petitioners' submission, which concedes that the action in question here is brought to "recover monies that are properly part of the debtor's estate and should be ratably distributed among creditors," and that fraudulent transfers put at risk "the basic policy of nondiscriminatory distribution that underlies the bankruptcy law." Brief for Petitioners 12. This, too, seems to belie the Court's view that actions to set aside fraudulent conveyances are not "integrally related" to reforming creditor-debtor relations.

Nor is the Court's conclusion about the nature of actions to recover fraudulently transferred property supportable either by reference to the state of American bankruptcy law prior to adoption of the 1978 Code, or by reference to the pre-1791 practice in the English courts. If the Court draws its conclusions based on the fact that these actions were not considered to be part of bankruptcy proceedings under the 1800 or 1898 Bankruptcy Acts (or, more generally, under federal bankruptcy statutes predating the 1978 Code), it has treated the power given Congress in Article I, §8, cl. 4, as if it were a disposable battery, good for a limited period only—once the power in it has been consumed by use, it is to be discarded and considered to have no future value. The power of Congress under this Clause is plainly not so limited: merely because Congress *once* had a scheme where actions such as this one were solely heard in plenary proceedings in Article III courts—where the Seventh Amendment attached—does not impugn the legality of every other possible arrangement. See also Part II–B, *infra*.

Perhaps instead the Court rests its conclusion on the practice of the 18th-century English courts. I take issue with this view of the old English law, below. But even if this were correct, I do not see why the Article I, § 8, power should be so restricted. See *ibid.*

One final observation with respect to *Katchen*. The Court attempts to distinguish *Katchen* by saying that a jury trial was not needed there because the funds in dispute were part of the "bankruptcy estate." *Ante*, at 57. "Our decision [in *Katchen*] turned . . . on the bankruptcy court's having 'actual or constructive possession' of the bankruptcy estate," the Court writes. *Ibid.* (quoting 382 U. S., at 327). But obviously in this case, the Bankruptcy Court similarly had "'actual or constructive possession' of the bankruptcy estate"; certainly it had as much constructive possession of the property sought as it had of the preference recovered in *Katchen*. Thus, it is as true here as it was in *Katchen* that the funds in dispute are part of the "bankruptcy estate." The Bankruptcy Code defines that estate to be comprised of "all the following property, wherever located and by whomever held," including "[a]ny interest in property that the trustee recovers under" the provision authorizing actions to recover fraudulently transferred property. 11 U. S. C. §§ 541(a)(3), 550 (1982 ed., Supp. V). Consequently, even if the Court is accurate in pinpointing the dispositive fact in the *Katchen* decision, that fact equally points towards a ruling for the trustee here.

In sum, I find that our holding in *Katchen*, and its underlying logic, dictate affirmance. The Court's decision today amounts to nothing less than a *sub silentio* overruling of that precedent.

II

Even if the question before us were one of first impression, however, and we did not have the decision in *Katchen* to guide us, I would dissent from the Court's decision. Under our cases, the determination whether the Seventh Amendment guarantees a jury trial on petitioners' claims must turn

on two questions: first, in what forum will those claims be heard; and second, what is the nature of those claims. A weighing of both of these factors must point toward application of the Seventh Amendment before that guarantee will attach.[5]

A

To read the Court's opinion, one might think that the Seventh Amendment is concerned only with the nature of a claim. If a claim is legal, the Court announces, then the Seventh Amendment guarantees a jury trial on that claim. *Ante*, at 42, n. 4. This is wrong. "[H]istory and our cases support the proposition that the right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved," *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 460–461 (1977). Perhaps like *Katchen*, *Atlas Roofing* is no longer good law after today's decision. A further examination of the issue before us reveals, though, that it is the

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[5] Since both of the relevant factors point against application of the Seventh Amendment here, resolving this case does not require offering some comprehensive view of how these factors are to be balanced. The ambiguity, however, is not of my creation, but rather, comes from the apparent inconsistency of our case law. For example, cases brought in state courts are *never* subject to the Seventh Amendment, no matter the nature of the claim; conversely, under the Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982), the sort of state-law contract claim at issue there could *never* be assigned by Congress to anything other than an Article III tribunal, in which the Seventh Amendment would apply. See also *post*, at 93 (BLACKMUN, J., dissenting). Other cases look at both factors, without being altogether clear on their relative import.

Whatever the shortcomings of this opinion for failing to resolve the difficult balancing question, it remains superior to the Court's method of "balancing" these concerns, which amounts to no balancing at all—and instead focuses solely on the nature of claim (*i. e.*, whether it is legal, and whether it concerns a public right, see *ante*, at 42, n. 4) in determining if the Seventh Amendment applies.

Court's decision today, and not our prior rulings, that is in error.

In the most obvious case, it has been held that the Seventh Amendment does not apply when a "suit at common law" is heard in a state court. *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211, 217 (1916); *Woods* v. *Holy Cross Hospital*, 591 F. 2d 1164, 1171, n. 12 (CA5 1979). Even with its exclusive focus on the claim at issue here, the Court does not purport to hold that a fraudulent conveyance action brought in state court would be covered by the Seventh Amendment, because that action was one at "common law" in the Court's view.

Nor does the Seventh Amendment apply in all federal forums. "[T]he Seventh Amendment is not applicable to administrative proceedings," for example. *Tull* v. *United States*, 481 U. S. 412, 418, n. 4 (1987). In these forums "'where jury trials would be incompatible with the whole concept of administrative adjudication,'" the Seventh Amendment has no application. *Atlas Roofing Co., supra*, at 454 (emphasis deleted) (quoting *Pernell* v. *Southall Realty*, 416 U. S. 363, 383 (1974)). Thus, we have often looked at the character of the federal forum in which the claim will be heard, asking if a jury has a place in that forum, when determining if the Seventh Amendment's guarantee of a jury trial will apply there.

Most specifically relevant for this case, we have indicated on several previous occasions that bankruptcy courts—by their very nature, courts of equity—are forums in which a jury would be out of place. "[A] bankruptcy court . . . [is] a specialized court of equity . . . a forum before which a jury would be out of place," *Atlas Roofing*, *supra*, at 454, n. 11; consequently, the Seventh Amendment has no application to these courts. "[T]he Court [has] recognized that a bankruptcy court has been traditionally viewed as a court of equity, and that jury trials would 'dismember' the statutory scheme of the Bankruptcy Act." *Curtis* v. *Loether*, 415

U. S. 189, 195 (1974). *Atlas Roofing*, *Curtis*, and countless other cases have recognized that Congress has the power to "entrust enforcement of statutory rights to [a] . . . specialized court of equity free from the strictures of the Seventh Amendment." *Curtis*, *supra*, at 195. Prior cases emphatically hold that bankruptcy courts are such specialized courts of equity. Indeed, we have stated that "bankruptcy courts are inherently proceedings in equity." *Katchen* v. *Landy*, 382 U. S., at 336; see also *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240 (1934).

Before today, this Court has never held that a party in a bankruptcy court has a Seventh Amendment right to a jury trial on its claims. Of course, the Court does not actually so hold today, preferring to be obtuse about just where petitioners are going to obtain the jury trial to which the Court deems them entitled. See *ante*, at 64. But in blithely ignoring the relevance of the forum Congress has designated to hear this action—focusing instead exclusively on the "legal" nature of petitioners' claim—the Court turns its back on a long line of cases that have rested, in varying degrees, on that point. The Court's decision today ignores our statement in *Atlas Roofing* that "even if the Seventh Amendment would have required a jury where the adjudication of [some types of] rights is assigned to a federal court of law instead of an administrative agency," this constitutional provision does not apply when Congress assigns the adjudication of these rights to specialized tribunals where juries have no place. *Atlas Roofing*, 430 U. S., at 455. Indeed, we observed in *Atlas Roofing* that it was even true in "English or American legal systems at the time of the adoption of the Seventh Amendment [that] the question whether a fact would be found by a jury turned to a considerable degree on the nature of the forum in which a litigant found himself." *Id.*, at 458.

The Court's decision also substantially cuts back on Congress' power to assign selected causes of action to specialized forums and tribunals (such as bankruptcy courts), by holding

that these forums will have to employ juries when hearing claims like the one before us today—a requirement that subverts in large part Congress' decision to create such forums in the first place. Past decisions have accorded Congress far more discretion in making these assignments. Thus, *Block* v. *Hirsh*, 256 U. S. 135, 158 (1921), found that a Seventh Amendment "objection amount[ed] to little" when Congress assigned what was, in essence, a common-law action for ejectment to a specialized administrative tribunal. We reiterated the vitality of *Block* v. *Hirsh* as recently as our decision in *Pernell* v. *Southall Realty*, *supra*, at 383, and the principle was reaffirmed in several cases between these two decisions. See n. 10, *infra*. In *Pernell*, referring to *Block* v. *Hirsh*, we stated that "the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency." *Pernell*, *supra*, at 383. Yet to the extent that such disputes involve matters that are "legal" in nature—as they clearly do—the Court's decision today means that Congress cannot do what we said in *Block* and *Pernell* that it could.[6]

Finally, the Court's ruling today ignores several additional reasons why juries have no place in bankruptcy courts and other "specialized courts of equity" like them. First, two of the principal rationales for the existence of the Seventh Amendment guarantee—the notions of "jury equity" and of juries serving as popular checks on life-tenured judges—are inapt in bankruptcy courts. As one scholar noted:

> "We have kept the *civil* jury . . . as a check on the federal judge whose life tenure makes [him] suspect [under]

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[6] Our decision in *Katchen*, 382 U. S., at 336 —which described the 1898 Act as "convert[ing] [a] legal claim into an equitable claim"—is often cited for the same principle; *i. e.*, as upholding "the power of Congress to take some causes of action outside the scope of the Seventh Amendment by providing for their enforcement . . . in a specialized court." See J. Friedenthal, M. Kane, & A. Miller, Civil Procedure 498 (1985).

> . . . the Populist traditions of this country. The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge.
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> "This . . . function . . . has little application to non-traditional civil proceedings such as those which occur in bankruptcy . . . . The condition of autocracy which would bring the underlying values of the Seventh Amendment [into force] is not present; the right to jury trial therefore has no application." Hearings on S. 558 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, the 100th Cong., 1st. Sess., 572–573 (1987) (statement of Paul Carrington).

Others have made this same observation. See, *e. g.*, *id.*, at 684–685 (statement of Prof. Rowe). Cf., *e. g.*, *In re Japanese Electronic Products Antitrust Litigation*, 631 F. 2d 1069, 1085 (CA3 1980). As respondent put it: "A jury in an equitable tribunal such as a bankruptcy court would in a sense be redundant." Brief for Respondent 22.

Beyond its redundancy, a requirement that juries be used in bankruptcy courts would be disruptive and would unravel the statutory scheme that Congress has created. The Court dismisses this prospect, and scoffs that it "can[not] seriously be argued that permitting jury trials" on this sort of claim would undermine the statutory bankruptcy scheme. *Ante*, at 61. Yet this argument has not only been "seriously" made, it was actually accepted by this Court in *Curtis* v. *Loether*, 415 U. S. 189 (1974). In *Curtis*, we observed that *Katchen* had rejected a Seventh Amendment claim (similar to the one before us today), due to our "recogni[tion] that a bankruptcy court has been traditionally viewed as a court of equity, and that jury trials would 'dismember' the statutory scheme of the Bankruptcy Act." *Curtis*, *supra*, at 195; see also *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S., at 454, n. 11. I fear that the Court's decision today will have the desultory effect we feared when *Curtis* was decided.

B

The above is not to say that Congress can vitiate the Seventh Amendment by assigning any claim that it wishes to a specialized tribunal in which juries are not employed. Cf. *Atlas Roofing*, *supra*, at 461, n. 16. Our cases require a second inquiry—the one that the Court focuses exclusively upon—concerning the nature of the claim so assigned.

To resolve this query, the Court properly begins its analysis with a look at English practice of the 18th century. See *ante*, at 43–47. After conducting this review, the Court states with confidence that "in 18th-century England . . . a court of equity would not have adjudicated" respondent's suit. *Ante*, at 47. While I agree that this action could have been brought at law—and perhaps even that it might have been so litigated in the most common case—my review of the English cases from the relevant period leaves me unconvinced that the chancery court would have *refused* to hear this action—the Court's conclusion today.

The Court itself confesses that "courts of equity sometimes provided relief in fraudulent conveyance actions." *Ante*, at 43. The Chancery Court put it stronger, though: "Courts of Equity have most certainly been in the habit of exercising a concurrent jurisdiction with the Courts of Law on the statutes of *Elizabeth* respecting fraudulent conveyances." *Hobbs* v. *Hull*, 1 Cox 445, 445–446, 29 Eng. Rep. 1242 (1788). Rarely has a more plain statement of the prevailing English practice at the time of ratification of the Seventh Amendment been discovered than this one; this alone should be enough to make respondent's case. Yet instead of accepting the pronouncement of the equity court about its own jurisdiction, this Court assumes the role of High Court of Historical Review, questioning the soundness of *Hobbs*' decision because it was issued without adequate supporting citations. *Ante*, at 45–46. A similar criticism is levied against another case from the same period, *Ex parte Scudamore*, 3 Ves. jun. 85,

30 Eng. Rep. 907 (Ch. 1796), which, as even the Court concedes, "demonstrates that fraudulent conveyance actions could be brought in equity." *Ante* at 45.

In addition to nitpicking respondent's supporting case law into oblivion, the Court's more general rejection of respondent's claim rests on two sources: a passing citation to a wholly inapposite case, *Buzard* v. *Houston*, 119 U. S. 347 (1886); and a more lengthy quotation from Professor Glenn's treatise on fraudulent conveyances. See *ante*, at 44. I will not deny that Professor Glenn's work supports the historical view that the Court adopts today. But notwithstanding his scholarly eminence, Professor Glenn's view of what the 18th-century English equity courts would have done with an action such as this one is not dispositive. Other scholars have looked at the same history and come to a different conclusion.[7] Still others have questioned the soundness of the distinction that Professor Glenn drew—between suits to set aside monetary conveyances and suits to avoid the conveyances of land—as unwise or unsupported. See, *e. g.*, *In re Wencl*, 71 B. R. 879, 883, n. 2 (Bkrtcy. Ct., DC Minn. 1987). Indeed, just a few pages after it rests its analysis of the 18th-century case law on Professor Glenn's writing, the Court itself dismisses this aspect of Professor Glenn's historical conclusions. See *ante*, at 46, n. 5. The Court embraces Professor Glenn's treatise where it agrees with it and calls it authoritative, while rejecting the portions it finds troublesome.

Trying to read the ambiguous history concerning fraudulent conveyance actions in equity—a task which the Court finds simple today—has perplexed jurists in each era, who have come to conflicting decisions each time that the question has found relevance. Even in *Schoenthal*'s time, and under

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[7] See, *e. g.*, 4 Collier on Bankruptcy ¶ 548.10, p. 548–125 (15th ed. 1989); O. Bump, Conveyances Made by Debtors to Defraud Creditors § 532 (4th ed. 1896); F. Wait, Fraudulent Conveyances and Creditors' Bills §§ 56–60 (1884); *Drake* v. *Rice*, 130 Mass. 410, 412 (1881) (Gray, C. J.); W. Roberts, Voluntary and Fraudulent Conveyances 525–526 (3d Am. ed. 1845).

the statutory regime applicable when that case was decided, many courts reviewing the same historical sources considered by us today had concluded that actions such as this one sounded in equity. See *Schoenthal* v. *Irving Trust Co.*, 287 U. S., at 96, n. 3; Note, 42 Yale L. J. 450, 450–452 (1933). In more recent times, an impressive collection of courts have come to a similar conclusion, finding that actions to avoid fraudulent conveyances were historically considered equitable in nature.[8]

In sum, I do not think that a fair reading of the history—our understanding of which is inevitably obscured by the passage of time and the irretrievable loss of subtleties in interpretation—clearly proves or disproves that respondent's action would have sounded in equity in England in 1791.[9]

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[8] See, *e. g.*, *In re Graham*, 747 F. 2d 1383, 1387 (CA7 1984); *Damsky* v. *Zavatt*, 289 F. 2d 46, 53 (CA2 1961) (Friendly, J.) (an action by a bankruptcy trustee to "set aside a fraudulent conveyance has long been cognizable in equity"); *Johnson* v. *Gardner*, 179 F. 2d 114, 116–117 (CA9 1949). See also *In re Harbour*, 840 F. 2d 1165, 1172–1178 (CA4 1988); *In re I. A. Durbin, Inc.*, 62 B. R. 139, 145 (SD Fla. 1986); *In re Hendon Pools of Michigan, Inc.*, 57 B. R. 801, 802–803 (ED Mich. 1986); *In re Southern Industrial Banking Corp.*, 66 B. R. 370, 372–375 (Bkrtcy Ct., ED Tenn. 1986).

[9] Nor do I think it clear, as the Court seems to, that simply because the remedy sought by respondent can be expressed in monetary terms, the relief he seeks is therefore "legal" in nature, and not equitable. *Ante*, at 47–49.

This Court has not accepted the view that "any award of monetary relief must necessarily be 'legal' relief." *Curtis* v. *Loether*, 415 U. S. 189, 196 (1974). We have previously recognized that actions to disgorge improperly gained profits, *Tull* v. *United States*, 481 U. S. 412, 424 (1987), to return funds rightfully belonging to another, *Curtis*, *supra*, at 197, or to submit specific funds wrongfully withheld, *Bowen* v. *Massachusetts*, 487 U. S. 879, 893–896 (1988), are all equitable actions—even though the relief they seek is monetary—because they are restitutionary in nature. Respondent's action against petitioners is of the same class, seeking a similar remedy.

Here the trustee is simply "ask[ing] the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully

With the historical evidence thus in equipoise—and with the nature of the relief sought here not dispositive either, see n. 8, *supra*—we should not hesitate to defer to Congress' exercise of its power under the express constitutional grant found in Article I, § 8, cl. 4, authorizing Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies." Congress has exercised that power, defining actions such as the one before us to be among the "core" of bankruptcy proceedings, triable in a bankruptcy court before a bankruptcy judge and without a jury. I would defer to these decisions.

The Court, however, finds that some (if not all) of these congressional judgments are constitutionally suspect. While acknowledging that "[t]o be sure, we owe some deference to Congress' judgment after it has given careful consideration to" such a legislative enactment, the Court declines to defer here because "respondent has adduced no evidence that Congress considered the constitutional implications of its designation of all fraudulent conveyance actions as core proceedings." *Ante*, at 61. See also *ante*, at 61–62, n. 16. This statement is remarkable, for it should not be assumed that Congress in enacting 28 U. S. C. § 157(b)(2)(H) (1982 ed., Supp. V) ignored its constitutional implications.[10] The Court

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belongs" to the estate; "[s]uch action is within . . . the highest tradition of a court of equity." *Porter* v. *Warner Co.*, 328 U. S. 395, 402 (1946). It should not matter whether respondent is seeking to have returned the precise cashier's checks that petitioner Medex had in its possession at one time, or the funds yielded to Medex by cashing those checks. To turn the case on this distinction would only give entities in Medex's position an incentive to consummate fraudulent transfers as quickly as possible: hardly a desirable one. A host of Bankruptcy Courts have recognized as much. See, *e. g.*, *In re Wencl*, 71 B. R. 879, 883–884, and n. 2 (DC Minn. 1987); *In re Reda, Inc.*, 60 B. R. 178, 181 (ND Ill. 1986).

[10] An irony of the Court's rebuke of Congress is that Congress' decision to include actions to avoid or recover fraudulent conveyances among "core" bankruptcy proceedings found its inspiration in the "Emergency Rule" drafted and issued by the Administrative Office of the United States Courts on December 3, 1982, to govern practice in the bankruptcy courts following our decision in *Northern Pipeline*. See Emergency Rule § d(3)(A)

does not say from where it draws its requirement that the Congress must provide us with some indication that it considered the constitutional dimensions of its decision before acting, as a prerequisite for obtaining our deference to those enactments.[11]

Moreover, the Court's cramped view of Congress' power under the Bankruptcy Clause to enlarge the scope of bankruptcy proceedings, ignoring that changing times dictate changes in these proceedings, stands in sharp contrast to a more generous view expressed some years ago:

> "The fundamental and radically progressive nature of [congressional] extensions [in the scope of bankruptcy laws] becomes apparent upon their mere statement . . . . Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of

("Related proceedings do not include . . . proceedings to set aside preferences and fraudulent conveyances"); see also *Addison* v. *O'Leary*, 68 B. R. 487, 491 (ED Va. 1986) ("[T]he jurisdictional provisions of the 1984 Bankruptcy Amendments closely parallel the Emergency Reference Rule"); G. Treister, J. Trost, L. Forman, K. Klee, & R. Levin, Fundamentals of Bankruptcy Law § 2.01(a), p. 31 (2d ed. 1988) (describing this portion of the Emergency Rule as the "forerunner" of the 1984 Amendments).

We learn today that, in retrospect, the Emergency Rule, too, was unconstitutional in its failure to include a jury trial right for actions to avoid fraudulent conveyances. It appears that it was not only Congress that failed in its duty to give adequate "consider[ation] [to] the constitutional implications of its" actions. Cf. *ante*, at 61.

[11] This is particularly unfortunate because today's ruling may be the first time ever that the Court has struck down a congressional designation of a particular cause of action as "equitable" in nature. See Note, Congressional Provision for Nonjury Trials, 83 Yale L. J. 401, 414–415 (1973) ("[T]he Court has never rejected a congressional indication that an action is equitable in nature"); but cf. *Curtis* v. *Loether*, *supra* ("re-interpreting" congressional enactment to respond to Seventh Amendment "concerns").

In the past, we have been far more deferential to Congress' designations in this regard. See, *e. g.*, *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U. S. 288, 290–295 (1960); *Porter* v. *Warner*, *supra*, at 397–402.

> human activities from 1800 to the present day. And these acts, far-reaching though they may be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed." *Continental Illinois National Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 671 (1935).

See also *Katchen* v. *Landy*, 382 U. S., at 328–329.

One of that period's leading constitutional historians expressed the same view, saying that the Framers of the Bankruptcy Clause "clearly understood that they were not building a straight-jacket to restrain the growth and shackle the spirits of their descendents for all time to come," but rather, were attempting to devise a scheme "which, while firm, was nevertheless to be flexible enough to serve the varying social needs of changing generations." C. Warren, Bankruptcy in United States History 4 (1935). Today, the Court ignores these lessons and places a straitjacket on Congress' power under the Bankruptcy Clause: a straitjacket designed in an era, as any reader of Dickens is aware, that was not known for its enlightened thinking on debtor-creditor relations.

Indeed, the Court calls into question the longstanding assumption of our cases and the bankruptcy courts that the equitable proceedings of those courts, adjudicating creditor-debtor disputes, are adjudications concerning "public rights." See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 71 (1982); *id.*, at 91 (REHNQUIST, J., concurring in judgment); *id.*, at 92 (Burger, C. J., dissenting); *id.*, at 108–118 (WHITE, J., dissenting). The list of lower court opinions that have reasoned from this assumption is so lengthy that I cannot reasonably include it in the text; a mere sampling fills the margin.[12] Yet today the Court calls

[12] Such cases decided since *Northern Pipeline*, from the Court of Appeals alone, include *In re Harbour*, 840 F. 2d, at 1177–1178; *In re Wood*, 825 F. 2d 90, 95–98 (CA5 1987); *In re Mankin*, 823 F. 2d 1296, 1307–1308 (CA9 1987), cert. denied *sub nom. Munn* v. *Duck*, 485 U. S. 1006 (1988); *In re*

all of this into doubt merely because these cases have been subjected to "substantial scholarly criticism." *Ante*, at 56, n. 11.[13] If no part of bankruptcy proceedings involve the adjudication of public rights, as the Court implies today, then *all* bankruptcy proceedings are saved from the strictures of the Seventh Amendment only to the extent that such proceedings are the descendants of earlier analogues heard in equity in 18th-century England. Because, as almost every historian has observed, this period was marked by a far more restrictive notion of equitable jurisdiction in bankruptcies, see, *e. g.*, Warren, *supra*, at 3–5, the Court's decision today may threaten the efficacy of bankruptcy courts as they are now constituted. I see no reason to use the Seventh Amendment as a tool to achieve this dubious result.

III

Because I find the Court's decision at odds with our precedent, and peculiarly eager to embark on an unclear

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Arnold Print Works, 815 F. 2d 165, 168–170 (CA1 1987); *Briden* v. *Foley*, 776 F. 2d 379, 381 (CA1 1985); and *In re Kaiser*, 722 F. 2d 1574, 1580, and n. 2 (CA2 1983). Many more such cases are found in the reports of the decisions of the District Courts and the Bankruptcy Courts.

[13] This is indicative of the Court's approach throughout its opinion: virtually every key holding announced today rests on a citation to scholarly authority, and not to any precedent of the Court. This includes the Court's holdings that the action at issue here was cognizable only at law in 18th-century England, *ante*, at 44; that fraudulent conveyance actions "more nearly resemble state-law contract claims . . . than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res," *ante*, at 56; and that Congress could not eliminate a jury trial right in this sort of action by placing it in "a specialized court of equity," *ante*, at 61—in short, the three critical holdings issued by the Court in its opinion.

Like the Court, I think the analysis of learned commentators is a useful tool to enhance our understanding of the law in a field such as bankruptcy. Unlike the Court, however, I would not use the views of these scholars as *the* basis for disposing of the case before us—particularly where those views counsel rejection of otherwise viable strains in our case law. See, *e. g.*, Gibson, Jury Trials in Bankruptcy, 72 Minn. L. Rev. 967, 1040–1041, n. 347 (1988) (cited *ante*, at 56, n. 11).

course in Seventh Amendment jurisprudence, I respectfully dissent.[14]

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins, dissenting.

I agree generally with what JUSTICE WHITE has said, but write separately to clarify, particularly in my own mind, the nature of the relevant inquiry.

Once we determine that petitioners have no statutory right to a jury trial, we must embark on the Seventh Amendment inquiry set forth in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442 (1977). First, we must determine whether the matter to be adjudicated is "legal" rather than "equitable" in nature, a determination which turns on the nature of the claim and of the relief sought. If the claim and the relief are deemed equitable, we need go no further: the Seventh Amendment's jury-trial right applies only to actions at law.

In this case, the historical inquiry is made difficult by the fact that, before the Federal Rules of Civil Procedure unified law and equity, parties might have been drawn to the equity side of the court because they needed its procedural tools and interim remedies: discovery, accounting, the power to clear title, and the like. In light of the frequency with which these tools were likely needed in fraud cases of any kind, it is no surprise that, as JUSTICE WHITE points out, fraudulent conveyance actions, even if cognizable at law, often would be found on the equity docket. See generally O. Bump, Conveyances Made by Debtors to Defraud Creditors § 532 (4th ed. 1896); F. Wait, Fraudulent Conveyances and Creditors' Bills §§ 59–60 (1884); W. Roberts, Voluntary and Fraudulent

[14] Because I do not believe that either petitioner is entitled to a jury trial under the Seventh Amendment, I do not reach the question whether petitioner Granfinanciera is deprived of any Seventh Amendment rights it might otherwise have due to its status as an instrument of a foreign sovereign. Like the Court, I would "leave for another day" the resolution of this difficult question. *Ante*, at 40.

Conveyances 525–526 (3d Am. ed. 1845). This procedural dimension of the choice between law and equity lends a tentative quality to any lessons we may draw from history.

The uncertainty in the historical record should lead us, for purposes of the present inquiry, to give the constitutional right to a jury trial the benefit of the doubt. Indeed, it is difficult to do otherwise after the Court's decision in *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92 (1932). *Schoenthal* turned on the legal nature of the preference claim and of the relief sought, *id.*, at 94–95, rather than upon the legal nature of the tribunal to which "plenary proceedings" were assigned under the 1898 Bankruptcy Act.

"With the historical evidence thus in equipoise," *ante*, at 87 (WHITE, J., dissenting), but with *Schoenthal* weighing on the "legal" side of the scale, I then would turn to the second stage of the *Atlas Roofing* inquiry: I would ask whether, assuming the claim here is of a "legal" nature, Congress has assigned it to be adjudicated in a special tribunal "with which the jury would be incompatible." *Atlas Roofing*, 430 U. S., at 450; see also *Tull* v. *United States*, 481 U. S. 412, 418, n. 4 (1987). Here, I agree with JUSTICE WHITE that *Katchen* v. *Landy*, 382 U. S. 323 (1966), as interpreted in *Atlas Roofing*, requires the conclusion that courts exercising core bankruptcy functions are equitable tribunals, in which "a jury would be out of place and would go far to dismantle the statutory scheme." *Atlas Roofing*, 430 U. S., at 454, n. 11.

Having identified the tribunal to which Congress has assigned respondent's fraudulent conveyance claim as equitable in nature, the question remains whether the assignment is one Congress may constitutionally make. Under *Atlas Roofing*, that question turns on whether the claim involves a "public right." *Id.*, at 455. When Congress was faced with the task of divining the import of our fragmented decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982), it gambled and predicted that a statutory right which is an integral part of a pervasive regulatory

scheme may qualify as a "public right." Compare H. R. Rep. No. 98–9, pt. 1, pp. 6, 13 (1983) (House Report), with S. Rep. No. 98–55, pp. 32–40 (1983) (Senate Report); see *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 586, 594 (1985); see also *id.*, at 599 (BRENNAN, J., concurring in judgment) ("[A] bankruptcy adjudication, though technically a dispute among private parties, may well be properly characterized as a matter of public rights"). Doing its best to observe the constraints of *Northern Pipeline* while at the same time preserving as much as it could of the policy goals of the major program of bankruptcy reform the decision in *Northern Pipeline* dismantled, see House Report, at 7, Senate Report, at 6–7, Congress struck a compromise. It identified those proceedings which it viewed as integral to the bankruptcy scheme as "core" (doing its best to exclude "*Marathon*-type State law cases"), and assigned them to a specialized equitable tribunal. *Id.*, at 2.

I agree with JUSTICE WHITE, *ante*, at 88–89, that it would be improper for this Court to employ, in its Seventh Amendment analysis, a century-old conception of what is and is not central to the bankruptcy process, a conception that Congress has expressly rejected. To do so would, among other vices, trivialize the efforts Congress has engaged in for more than a decade to bring the bankruptcy system into the modern era.

There are, nonetheless, some limits to what Congress constitutionally may designate as a "core proceeding," if the designation has an impact on constitutional rights. Congress, for example, could not designate as "core bankruptcy proceedings" state-law contract actions brought by debtors against third parties. Otherwise, *Northern Pipeline* would be rendered a nullity. In this case, however, Congress has not exceeded these limits.

Although causes of action to recover fraudulent conveyances exist outside the federal bankruptcy laws, the problems created by fraudulent conveyances are of particular sig-

nificance to the bankruptcy process. Indeed, for this reason, the Bankruptcy Code long has included substantive legislation regarding fraudulent conveyances and preferences. And the cause of action respondent brought in this case arises under federal law. See 11 U. S. C. §§ 548(a)(2) and 550(a). This substantive legislation is not a jurisdictional artifice. It reflects, instead, Congress' longstanding view that fraudulent conveyances and preferences on the eve of bankruptcy are common methods through which debtors and creditors act to undermine one of the central goals of the bankruptcy process: the fair distribution of assets among creditors. Congress' conclusion that the proper functioning of the bankruptcy system requires that expert judges handle these claims, and that the claims be given higher priority than they would receive on a crowded district court's civil jury docket (see Senate Report, at 3; House Report, at 7–8), is entitled to our respect.

The fact that the reorganization plan in this case provided that the creditor's representatives would bring fraudulent conveyance actions only after the plan was approved does not render the relationship between fraudulent conveyance actions and the bankruptcy process "adventitious." *Ante*, at 60, n. 15 (majority opinion). Creditors would be less likely to approve a plan which forced them to undertake the burden of collecting fraudulently transferred assets if they were not assured that their claims would receive expert and expedited treatment.

In sum, it must be acknowledged that Congress has legislated treacherously close to the constitutional line by denying a jury trial in a fraudulent conveyance action in which the defendant has no claim against the estate. Nonetheless, given the significant federal interests involved, and the importance of permitting Congress at long last to fashion a modern bankruptcy system which places the basic rudiments of the bankruptcy process in the hands of an expert equitable tribunal, I cannot say that Congress has crossed the constitutional line on the facts of this case. By holding otherwise, the Court

today throws Congress into still another round of bankruptcy court reform, without compelling reason. There was no need for us to rock the boat in this case. Accordingly, I dissent.

HOFFMAN, TRUSTEE *v.* CONNECTICUT DEPARTMENT OF INCOME MAINTENANCE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88–412. Argued April 19, 1989—Decided June 23, 1989

Section 106(c) of the Bankruptcy Code provides that "notwithstanding any assertion of sovereign immunity" any provision of the Code that contains "'creditor,' 'entity,' or 'governmental unit' applies to governmental units," § 106(c)(1); and that "a determination by the court of an issue arising under such a provision binds governmental units," § 106(c)(2). Petitioner Hoffman, the bankruptcy trustee in two unrelated Chapter 7 proceedings, filed separate adversarial proceedings in the Bankruptcy Court. One was a "turnover" proceeding under § 542(b) against respondent Connecticut Department of Income Maintenance to recover Medicaid payments owed for services rendered by a bankrupt convalescence home. The other, filed against respondent Connecticut Department of Revenue Services, sought under § 547(b) to avoid the payment of state taxes, interest, and penalties as a preference and to recover an amount already paid. Respondents moved to dismiss both actions as barred by the Eleventh Amendment. The Bankruptcy Court denied the motions on the ground that Congress, in enacting § 106(c), had abrogated the States' Eleventh Amendment immunity from actions under §§ 542(b) and 547(b), which contain the "trigger" words enumerated in § 106(c)(1), and that Congress had authority to do so under the Bankruptcy Clause of the Constitution. The state respondents appealed to the District Court, and respondent United States intervened. The District Court reversed without reaching the issue of congressional authority. The Court of Appeals affirmed, concluding that § 106(c)'s plain language abrogates sovereign immunity only to the extent necessary to determine a State's rights in the debtor's estate and does not abrogate such immunity from recovery of an avoided preferential transfer of money or from a turnover proceeding.

Held: The judgment is affirmed.

850 F. 2d 50, affirmed.

JUSTICE WHITE, joined by THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY, concluded that in enacting § 106(c) Congress did not abrogate the Eleventh Amendment immunity of the States. Congress has not made an intention to abrogate unmistakably clear in the provision's language. The narrow scope of the waivers of sovereign im-

munity as to certain particular claims in §§ 106(a) and (b) make it unlikely that Congress adopted in § 106(c) a broad abrogation of immunity making States subject to all provisions of the Code containing any of the trigger words. If it did, § 106(c) would apply to over 100 Code provisions. Section 106(c)(2), joined to subsection (c)(1) by the conjunction "and," narrows the type of relief to which the section applies, since, unlike §§ 106(a) and (b), it does not provide an express authorization for monetary recovery from the States. Thus, a State that files no proof of claim would be bound, like other creditors, by a discharge of debts, including unpaid taxes, but would not be subject to monetary recovery. Under this construction, the language "notwithstanding any assertion of sovereign immunity" waives the immunity of the Federal Government so that it is bound by the Bankruptcy Court's determination of issues even when it did not appear and subject itself to such court's jurisdiction. In contrast, under petitioner's argument that the sections containing the trigger words supply the authorization for monetary recovery, § 106(c) would have exactly the same effect if subsection (c)(2) had been omitted. This Court is not persuaded that the use of the word "determine" in the Code's jurisdictional provision, 28 U. S. C. § 157(b)(1), is to the contrary. That provision authorizes bankruptcy judges to determine "cases" and "proceedings," not issues, and to "enter appropriate orders and judgments," not merely to bind governmental units by their determinations. Petitioner's reliance on § 106(c)'s legislative history and the policies underlying the Bankruptcy Code is also misplaced, since they are not based on the text of the statute and thus cannot be used to determine whether Congress intended to abrogate the Eleventh Amendment. Pp. 100–104.

JUSTICE SCALIA, although concluding that petitioner's actions are barred by the Eleventh Amendment, would affirm the Court of Appeals' judgment on the ground that Congress had no power to abrogate the States' Eleventh Amendment immunity. It makes no sense to affirm the constitutional principle that the judicial power of the United States does not extend to a suit directly against a State by one of its citizens unless the State itself consents to be sued and to hold at the same time that Congress can override the principle by statute in the exercise of its Article I powers. P. 105.

WHITE, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 105. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 105. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ.,

joined, *post*, p. 106. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 111.

Martin W. Hoffman, *pro se*, argued the cause and filed a brief for petitioner.

Deputy Solicitor General Merrill argued the cause for the United States. With him on the brief were *Acting Solicitor General Bryson*, *Assistant Attorney General Bolton*, and *Christopher J. Wright*. *Clarine Nardi Riddle*, Acting Attorney General of Connecticut, argued the cause for the state respondents. With her on the brief were *Kenneth A. Graham*, *Joan E. Pilver*, and *Carl J. Schuman*, Assistant Attorneys General.*

JUSTICE WHITE announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY join.

The issue presented by this case is whether § 106(c) of the Bankruptcy Code, 11 U. S. C. § 106(c), authorizes a bankruptcy court to issue a money judgment against a State that has not filed a proof of claim in the bankruptcy proceeding.

Petitioner Martin W. Hoffman is the bankruptcy trustee for Willington Convalescent Home, Inc. (Willington), and

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**Michael E. Friedlander*, *Charles R. Work*, and *Seth D. Greenstein* filed a brief for Inslaw, Inc., as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Arizona, by *Robert K. Corbin*, Attorney General, and *Anthony B. Ching*, Solicitor General; and for the State of Illinois et al. by *Neil F. Hartigan*, Attorney General of Illinois, *Robert J. Ruiz*, Solicitor General, and *James C. O'Connell* and *Barbara L. Greenspan*, Special Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Warren Price III* of Hawaii, *Linley E. Pearson* of Indiana, *William J. Guste, Jr.*, of Louisiana, *Frank J. Kelley* of Michigan, *Robert M. Spire* of Nebraska, *John P. Arnold* of New Hampshire, *Lacy H. Thornburg* of North Carolina, *Nicholas J. Spaeth* of North Dakota, *T. Travis Medlock* of South Carolina, *Charles W. Burson* of Tennessee, *James Mattox* of Texas, *R. Paul Van Dam* of Utah, *Jeffrey L. Amestoy* of Vermont, *Mary Sue Terry* of Virginia, *Charles G. Brown* of West Virginia, and *Donald J. Hanaway* of Wisconsin.

Edward Zera in two unrelated Chapter 7 proceedings. On behalf of Willington, he filed an adversarial proceeding in United States Bankruptcy Court—a "turnover" proceeding under 11 U. S. C. § 542(b)—against respondent Connecticut Department of Income Maintenance. Petitioner sought to recover $64,010.24 in payments owed to Willington for services it had rendered during March 1983 under its Medicaid contract with Connecticut. Willington closed in April 1983. At that time, it owed respondent $121,408 for past Medicaid overpayments that Willington had received, but respondent filed no proof of claim in the Chapter 7 proceeding.

Petitioner likewise filed an adversarial proceeding in United States Bankruptcy Court on behalf of Edward Zera against respondent Connecticut Department of Revenue Services. Zera owed the State of Connecticut unpaid taxes, penalties, and interest, and in the month prior to Zera's filing for bankruptcy the Revenue Department had issued a tax warrant resulting in a payment of $2,100.62. Petitioner sought to avoid the payment as a preference and recover the amount paid. See 11 U. S. C. § 547(b).

Respondents moved to dismiss both actions as barred by the Eleventh Amendment. In each case the Bankruptcy Court denied the motions to dismiss, reasoning that Congress in § 106(c) had abrogated the States' Eleventh Amendment immunity from actions under §§ 542(b) and 547(b) of the Bankruptcy Code and that Congress had authority to do so under the Bankruptcy Clause of the United States Constitution, Art. I, § 8, cl. 4. Respondents appealed to the United States District Court, and the United States intervened because of the challenge to the constitutionality of § 106. The District Court reversed without reaching the issue of congressional authority. 72 B. R. 1002 (Conn. 1987). The court held that § 106(c), when read with the other provisions of § 106, did not unequivocally abrogate Eleventh Amendment immunity.

The United States Court of Appeals for the Second Circuit affirmed the District Court. 850 F. 2d 50 (1988). The Court of Appeals concluded that the plain language of § 106(c) abrogates sovereign immunity "only to the extent necessary for the bankruptcy court to determine a state's rights in the debtor's estate." *Id.*, at 55. The section does not, according to the Court of Appeals, abrogate a State's Eleventh Amendment immunity from recovery of an avoided preferential transfer of money or from a turnover proceeding. The Court of Appeals specifically rejected petitioner's reliance on the legislative history of § 106(c) because that expression of congressional intent was not contained in the language of the statute as required by *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985). Because the actions brought by petitioner were not within the scope of § 106(c), the court held that they were barred by the Eleventh Amendment.

The Second Circuit's decision conflicts with the decisions of the Third Circuit in *Vazquez* v. *Pennsylvania Dept. of Public Welfare*, 788 F. 2d 130, 133, cert. denied, 479 U. S. 936 (1986), and the Seventh Circuit in *McVey Trucking, Inc.* v. *Secretary of State of Illinois*, 812 F. 2d 311, 326–327, cert. denied, 484 U. S. 895 (1987). We granted certiorari to resolve the conflict, 488 U. S. 1003 (1989), and we now affirm.

Section 106 provides as follows:

> "(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> "(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> "(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—

"(1) a provision of this title that contains 'creditor,' 'entity,' or 'governmental unit' applies to governmental units; and

"(2) a determination by the court of an issue arising under such a provision binds governmental units." 11 U. S. C. § 106.

Neither § 106(a) nor § 106(b) provides a basis for petitioner's actions here, since respondents did not file a claim in either Chapter 7 proceeding. Instead, petitioner relies on § 106(c), which he asserts subjects "governmental units," which includes States, 11 U. S. C. § 101(26), to all provisions of the Bankruptcy Code containing any of the "trigger" words in § 106(c)(1). Both the turnover provision, § 542(b), and the preference provision, § 547(b), contain trigger words—"an entity" is required to pay to the trustee a debt that is the property of the estate, and a trustee can under appropriate circumstances avoid the transfer of property to "a creditor." Therefore, petitioner reasons, those provisions apply to respondents "notwithstanding any assertion of sovereign immunity," including Eleventh Amendment immunity.

We disagree. As we have repeatedly stated, to abrogate the States' Eleventh Amendment immunity from suit in federal court, which the parties do not dispute would otherwise bar these actions, Congress must make its intention "unmistakably clear in the language of the statute." *Atascadero State Hospital* v. *Scanlon*, *supra*, at 242; see also *Dellmuth* v. *Muth*, 491 U. S. 223, 227–228 (1989); *Welch* v. *Texas Dept. of Highways and Public Transp.*, 483 U. S. 468, 474 (1987) (plurality opinion). In our view, § 106(c) does not satisfy this standard.

Initially, the narrow scope of the waivers of sovereign immunity in §§ 106(a) and (b) makes it unlikely that Congress adopted in § 106(c) the broad abrogation of Eleventh Amendment immunity for which petitioner argues. The language of § 106(a) carefully limits the waiver of sovereign immunity

under that provision, requiring that the claim against the governmental unit arise out of the same transaction or occurrence as the governmental unit's claim. Subsection (b) likewise provides for a narrow waiver of sovereign immunity, with the amount of the offset limited to the value of the governmental unit's allowed claim. Under petitioner's interpretation of § 106(c), however, the only limit is the number of provisions of the Bankruptcy Code containing one of the trigger words. With this "limit," § 106(c) would apply in a scattershot fashion to over 100 Code provisions.

We believe that § 106(c)(2) operates as a further limitation on the applicability of § 106(c), narrowing the type of relief to which the section applies. Section 106(c)(2) is joined with subsection (c)(1) by the conjunction "and." It provides that a "determination" by the bankruptcy court of an "issue" "binds governmental units." This language differs significantly from the wording of §§ 106(a) and (b), both of which use the word "claim," defined in the Bankruptcy Code as including a "right to payment." See 11 U. S. C. § 101(4)(A). Nothing in § 106(c) provides a similar express authorization for monetary recovery from the States.

The language of § 106(c)(2) is more indicative of declaratory and injunctive relief than of monetary recovery. The clause echoes the wording of sections of the Code such as § 505, which provides that "the court may determine the amount or legality of any tax," 11 U. S. C. § 505(a)(1), a determination of an issue that obviously should bind the governmental unit but that does not require a monetary recovery from a State. We therefore construe § 106(c) as not authorizing monetary recovery from the States. Under this construction of § 106 (c), a State that files no proof of claim would be bound, like other creditors, by discharge of debts in bankruptcy, including unpaid taxes, see *Neavear* v. *Schweiker*, 674 F. 2d 1201, 1204 (CA7 1982); cf. *Gwilliam* v. *United States*, 519 F. 2d 407, 410 (CA9 1975), but would not be subjected to monetary recovery.

We are not persuaded by the suggestion of petitioner's *amicus* that the use of the word "determine" in the jurisdictional provision of the Code, 28 U. S. C. § 157(b)(1) (1982 ed., Supp. V), is to the contrary. Brief for INSLAW, Inc., as *Amicus Curiae* 10–11. That provision authorizes bankruptcy judges to determine "cases" and "proceedings," not issues, and provides that the judge may "enter appropriate orders and judgments," not merely bind the governmental unit by its determinations. Moreover, the construction we give to § 106(c) does not render irrelevant the language of the section that it applies "notwithstanding any assertion of sovereign immunity." The section applies to the Federal Government as well, see 11 U. S. C. § 101(26) (defining "governmental unit" as including the "United States"), and the language in § 106(c) waives the sovereign immunity of the Federal Government so that the Federal Government is bound by determinations of issues by the bankruptcy courts even when it did not appear and subject itself to the jurisdiction of such courts. See, *e. g.*, *Neavear*, *supra*, at 1204.

Petitioner contends that the language of the sections containing the trigger words supplies the necessary authorization for monetary recovery from the States. This interpretation, however, ignores entirely the limiting language of § 106(c)(2). Indeed, § 106(c), as interpreted by petitioner, would have exactly the same effect if subsection (c)(2) had been totally omitted. "It is our duty 'to give effect, if possible, to every clause and word of a statute,'" *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955) (quoting *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883)), and neither petitioner nor his *amicus* suggests any effect that their interpretation gives to subsection (c)(2).

Finally, petitioner's reliance on the legislative history of § 106(c) is also misplaced. He points in particular to floor statements to the effect that "section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit." See 124 Cong. Rec. 32394

(1978) (statement of Rep. Edwards); *id.*, at 33993 (statement of Sen. DeConcini). The Government suggests that these statements should be construed as referring only to cases in which the debtor retains a possessory or ownership interest in the property that the trustee seeks to recover, Brief for United States 20, and cites as an example this Court's decision in *United States* v. *Whiting Pools, Inc.*, 462 U. S. 198 (1983) (holding that the Internal Revenue Service could be required to turn over to bankrupt estate tangible property to which debtor retained ownership).

The weakness in petitioner's argument is more fundamental, however, as the Second Circuit properly recognized. As we observed in *Dellmuth* v. *Muth*, 491 U. S., at 230, "[l]egislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment." If congressional intent is unmistakably clear in the language of the statute, reliance on committee reports and floor statements will be unnecessary, and if it is not, *Atascadero* will not be satisfied. 491 U. S., at 228–229. Similarly, the attempts of petitioner and his *amicus* to construe § 106(c) in light of the policies underlying the Bankruptcy Code are unavailing. These arguments are not based in the text of the statute and so, too, are not helpful in determining whether the command of *Atascadero* is satisfied. See 491 U. S., at 230.

We hold that in enacting § 106(c) Congress did not abrogate the Eleventh Amendment immunity of the States. Therefore, petitioner's actions in United States Bankruptcy Court under §§ 542(b) and 547(b) of the Code are barred by the Eleventh Amendment. Since we hold that Congress did not abrogate Eleventh Amendment immunity by enacting § 106(c), we need not address whether it had the authority to do so under its bankruptcy power. Cf. *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1 (1989). The judgment of the Second Circuit is affirmed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

Although I agree with JUSTICE SCALIA that Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause, a majority of the Court addresses instead the question whether Congress expressed a clear intention to abrogate the States' Eleventh Amendment immunity. On the latter question, I agree with JUSTICE WHITE and join the plurality's opinion.

JUSTICE SCALIA, concurring in the judgment.

I concur in the Court's judgment that "petitioner's actions in United States Bankruptcy Court under §§ 542(b) and 547(b) of the [Bankruptcy] Code are barred by the Eleventh Amendment." *Ante*, at 104. I reach this conclusion, however, not on the plurality's basis that "Congress did not abrogate Eleventh Amendment immunity" of the States, *ibid.*, but on the ground that it had no power to do so. As I explained in my opinion concurring in part and dissenting in part in *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 35–42 (1989), it makes no sense to affirm the constitutional principle established by *Hans* v. *Louisiana*, 134 U. S. 1 (1890), that "'a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued,'" *Welch* v. *Texas Dept. of Highways and Public Transp.*, 483 U. S. 468, 486 (1987) (plurality opinion), quoting *Hans*, *supra*, at 21 (Harlan, J., concurring), and to hold at the same time that Congress can override this principle by statute in the exercise of its Article I powers. *Union Gas* involved Congress' powers under the Commerce Clause, but there is no basis for treating its powers under the Bankruptcy Clause any differently. Accordingly, I would affirm the judgment of the Court of Appeals without the necessity of considering whether Congress intended to exercise a power it did not possess.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

In my view, the language of § 106(c) of the Bankruptcy Code (Code), 11 U. S. C. § 106(c), satisfies even the requirement that Congress' intent to abrogate the States' Eleventh Amendment immunity be "unmistakably clear." *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985). Because Congress clearly expressed its intent to authorize a bankruptcy court to issue a money judgment against a State that has not filed a proof of claim in a bankruptcy proceeding, and because Congress has the authority under the Bankruptcy Clause to abrogate the States' Eleventh Amendment immunity, I respectfully dissent.

Section 106(c) states that, "notwithstanding *any* assertion of sovereign immunity," any Code provision containing one of the trigger words—"creditor," "entity," or "governmental unit"—applies to the States, and that "a determination by the court of an issue arising under such a provision binds [the States]" (emphasis added). The drafters of § 106(c) were fully aware of "the requirement in case law that an express waiver of sovereign immunity is required in order to be effective." 124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards); *id.*, at 33993 (statement of Sen. DeConcini); see *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279, 285 (1973). They therefore carefully abrogated the States' sovereign immunity in three steps. First, they eliminated "any assertion of sovereign immunity." § 106(c). Second, they included States within the trigger words used elsewhere in the Code. § 106(c)(1). Third, they provided that States would be bound by the orders of the bankruptcy court. § 106(c)(2). What the plurality sees as redundancy in subsections (c)(1) and (c)(2) is thus more reasonably understood as evidence of the importance Congress attached to

ensuring that the abrogation of sovereign immunity was express.[1]

By its terms, § 106(c) makes no distinction between Code provisions that contain trigger words and permit only injunctive and declaratory relief, and Code provisions that contain trigger words and permit money judgments. Nevertheless, by placing heavy emphasis on the word "determination" in § 106(c)(2), the plurality concludes that § 106(c), in its entirety, is "more indicative of declaratory and injunctive relief than of monetary recovery." *Ante*, at 102. The plurality justifies this conclusion by accepting an analogy to the use of the word "determine" in a Code provision dealing with taxes, § 505(a)(1), while rejecting an equally compelling analogy to the use of the word "determine" in the Code's jurisdictional provision, 28 U. S. C. § 157(b)(1) (1982 ed., Supp. V). But instead of trying to force meaning into the word "determination" through competing analogies to other Code provisions, we should give decisive weight to the explicit language abrogating sovereign immunity.

The plurality correctly points out that the abrogation of sovereign immunity in § 106(c) should not be read to over-

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[1] Not surprisingly, most courts considering § 106(c) have concluded that it clearly allows a trustee to recover preferences from a State and to require a State to turn over money belonging to the debtor. See, *e. g.*, *WJM, Inc.* v. *Massachusetts Dept. of Public Welfare*, 840 F. 2d 996, 1001 (CA1 1988); *McVey Trucking, Inc.* v. *Secretary of State of Illinois*, 812 F. 2d 311, 326–327 (CA7), cert. denied, 484 U. S. 895 (1987); *Neavear* v. *Schweiker*, 674 F. 2d 1201, 1202–1204 (CA7 1982); *Rhode Island Ambulance Services, Inc.* v. *Begin*, 92 B. R. 4, 6–7 (Bkrtcy. Ct., RI 1988); *Tew* v. *Arizona State Retirement System*, 78 B. R. 328, 329–331 (SD Fla. 1987); cf. *Gingold* v. *United States*, 80 B. R. 555, 561 (Bkrtcy. Ct., ND Ga. 1987); *R & L Refunds* v. *United States*, 45 B. R. 733, 735 (Bkrtcy. Ct.,WD Ky. 1985); *Gower* v. *Farmers Home Administration*, 20 B. R. 519, 521–522 (Bkrtcy. Ct., MD Ga. 1982); *Remke, Inc.* v. *United States*, 5 B. R. 299, 300–302 (Bkrtcy. Ct., ED Mich. 1980). A leading bankruptcy commentator also reads § 106(c) to abrogate state sovereign immunity. 2 Collier on Bankruptcy ¶ 106.04 (15th ed. 1989).

whelm the narrow scope of the voluntary waiver set forth in §§ 106(a) and (b). But the plurality's conclusion that § 106(c) must therefore refer only to declarative and injunctive relief rests on the mistaken assumption that, without such a narrowing interpretation, "the *only* limit is the number of provisions in the Bankruptcy Code containing one of the trigger words." *Ante*, at 102 (emphasis added). The plurality then raises the specter that "§ 106(c) would apply in a scattershot fashion to over 100 Code provisions," *ibid.*, offering virtually endless opportunities for money judgments against the States.

Nothing could be further from the truth, for most of the Code provisions containing trigger words do not contemplate money judgments. Some provide States, in their role as creditors or entities, with rights against the debtor.[2] Others limit relief against "creditors," "entities," or "governmental units" to declaratory or injunctive relief.[3] Only a

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[2] See, *e. g.*, § 303(b)(1) (permitting three or more "entities" to file an involuntary case against a debtor); § 303(c) (giving "creditors" who do not file an involuntary case the same rights as those who do); § 303(j) (requiring notice to all "creditors" before a court may dismiss an involuntary case); § 341(a) (requiring a meeting of "creditors"); § 343 (permitting "creditors" to examine the debtor); § 349(b)(3) (revesting property in an "entity" if the petition is dismissed); § 361 (setting forth adequate protection for certain property interests of an "entity"); § 363(c)(2)(A) (preventing use, lease, or sale of cash collateral assets absent consent of an interested "entity"); §§ 501 and 502 (regulating filing of proofs of claims by "creditors"); § 506(a) (granting secured status to lien "creditors"); § 553 (granting rights of setoff to certain "creditors"); §§ 702(a) and 705 (giving qualified "creditors" the right to vote for the trustee and the creditors' committee); §§ 507 and 726 (setting forth priorities of distribution to "creditors"); § 727(c) (giving a "creditor" the right to object to a discharge); § 1102 (providing for court appointed creditors' committee); § 1109(b) (giving a "creditor" the right to be heard on any issue); § 1121(c) (providing that a "creditor" may file a reorganization plan).

[3] See, *e. g.*, § 365 (permitting the trustee to assume or reject executory contracts and unexpired leases in certain circumstances); § 505 (permitting the bankruptcy court to determine the debtor's tax liability in certain circumstances); § 525 (protecting the debtor against government discrimina-

handful of the triggered sections clearly contemplate money judgments *against* a "creditor," "entity," or "governmental unit." These include the Code provisions at issue in this case, *i. e.*, the provision giving a trustee the power to avoid preferential payments made to "creditors," § 547, and the provision requiring "entities" to turn over property and money belonging to the debtor. § 542.[4] Thus, rather than reading § 106(c) in isolation as the plurality does, the provision should be read in light of the Code provisions containing the trigger words "creditor," "entity," and "governmental unit." Only in this way is it possible to appreciate the limited extent to which Congress sought to abrogate the States' sovereign immunity in § 106(c). See *Kelly* v. *Robinson*, 479 U. S. 36, 43 (1986) (Code should be read as an integrated whole).

By expressly including States within the terms "creditor" and "entity," Congress intended States generally to be treated the same as ordinary "creditors" and "entities," who are subject to money judgments in a relatively small number of Code provisions. The effect of today's decision is to exempt States from these provisions, which are crucial to the efficacy of the Code. The plurality therefore ignores Congress' careful choice of language and turns States into pre-

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tion in licensing and employment); § 1141 (binding "creditors" to the terms of a confirmed reorganization plan and discharging all other claims); § 1142 (permitting the bankruptcy court to require performance of any act necessary to carry out a confirmed reorganization plan); § 1143 (preventing an "entity" that fails to perform a required act from participating in the distribution of estate assets).

[4] Several Code provisions that permit money judgments do not apply to States. For example, 11 U. S. C. § 362(h) (1982 ed., Supp. V) provides that an individual injured as a result of a willful violation of an automatic stay may recover actual damages and, where appropriate, punitive damages. Because § 362(h) contains no trigger words, it does not apply to States. See also *Prime, Inc.* v. *Illinois Dept. of Transp.*, 44 B. R. 924, 925–927 (Bkrtcy. Ct., WD Mo. 1984); *Gillman* v. *Board of Trustees of Alpine School Dist.*, 40 B. R. 781, 788–790 (Bkrtcy. Ct., Utah 1984).

ferred actors.[5] By allowing a trustee to recapture payments made to creditors 90 days before a bankruptcy petition is filed, the preference provision prevents anxious creditors from grabbing payments from an insolvent debtor and hence getting more than their fair share. After today, however, any State owed money by a debtor with financial problems will have a strong incentive to collect whatever it can, as fast as it can, even if doing so pushes the debtor into bankruptcy. Ordinary creditors will soon realize that States can receive more than their fair share; the very existence of this governmental power will cause these other creditors, in turn, to increase pressure on the debtor. See *McVey Trucking, Inc.* v. *Secretary of State of Illinois*, 812 F. 2d 311, 328 (CA7), cert. denied, 484 U. S. 895 (1987).[6] The turnover provision is designed to prevent third parties from keeping property of the debtor or from refusing to make payments owed to the debtor, thereby aiding the reorganization of the debtor's af-

[5] When Congress wanted to grant States special treatment, it specifically used the term "governmental unit." See, *e. g.*, § 101(35) (1982 ed., Supp. V) (defining the term "person" so that it does not generally include a "governmental unit"); § 346(f) (requiring the trustee to withhold State and local taxes from claims based on wages or salaries); §§ 362(b)(4) and (5) (exempting from the automatic stay provision actions of "governmental units" to enforce police or regulatory powers); § 362(b)(9) (1982 ed., Supp. V) (exempting from the automatic stay provision a "governmental unit's" issuance of a notice of tax deficiency); § 507(a)(7) (1982 ed., Supp. V) (creating relatively high priority for certain taxes owed to "governmental units"); §§ 523(a)(1) and (7) (exempting from discharge certain taxes and fines payable to "governmental units"); § 523(a)(8) (exempting from discharge student loans guaranteed by "governmental units"); § 1129(d) (barring bankruptcy court from confirming a reorganization plan if the principal purpose of the plan is the avoidance of taxes).

[6] The plurality's decision to exempt States from the preference provision is contrary to the understanding of the members of the Conference Committee who presented § 106(c) to Congress. See 124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards) (§ 106(c) will cover situations in which "a trustee or debtor in possession . . . assert[s] avoiding powers under title 11 against a governmental unit"); *id.*, at 33993 (statement of Sen. DeConcini) (same).

fairs or the orderly and equitable distribution of the estate. See *United States* v. *Whiting Pools, Inc.*, 462 U. S. 198, 202–203 (1983). Exempting States from this provision, as well as from the preference provision, undermines these important policy goals of the Code.

My conclusion that Congress intended § 106(c) to abrogate the States' Eleventh Amendment immunity against money judgments requires me to decide whether Congress has the authority under the Bankruptcy Clause to do so.[7] In *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 19 (1989) (plurality opinion); *id.*, at 57 (WHITE, J., concurring in judgment), we held that Congress has the authority under the Commerce Clause to abrogate the States' Eleventh Amendment immunity. I see no reason to treat Congress' power under the Bankruptcy Clause any differently, for both constitutional provisions give Congress plenary power over national economic activity. See The Federalist No. 42, p. 271 (C. Rossiter ed. 1961) (J. Madison) (describing the Bankruptcy Clause and the Commerce Clause as "intimately connected"); cf., *ante*, at 105 (SCALIA, J., concurring in judgment).

For the reasons stated, I respectfully dissent.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

While I join JUSTICE MARSHALL's dissenting opinion, I think it is appropriate to explain why the legislative history of 11 U. S. C. § 106 lends added support to his reading of the statute.

The drafters of the Bankruptcy Code were well aware of the value to the bankruptcy administration process of a waiver of federal and state sovereign immunity. In 1973, five years before the Code was enacted, the Commission on the Bankruptcy Laws of the United States proposed a broad

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[7] The Bankruptcy Clause provides: "Congress shall have Power To . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U. S. Const., Art. I, § 8, cl. 4.

waiver of sovereign immunity under which every provision of the proposed bankruptcy bill would apply to the States. That provision was not enacted into law apparently because of concerns that Congress did not have the constitutional power to abrogate completely the States' sovereign immunity. See H. R. Rep. No. 95–595, p. 317 (1977); S. Rep. No. 95–989, p. 29 (1978). Instead, the initial legislation drafted by Congress limited the waiver of sovereign immunity to compulsory counterclaims and offsets, the provisions that now appear in §§ 106(a) and 106(b). Section 106(c), added after the bill that became the Bankruptcy Code was reported by the Senate and House Committees, restored to a large extent the power of the bankruptcy courts over States that had first been proposed in 1973. Whereas the waiver contained in the Commission on the Bankruptcy Laws' proposal would have subjected the States to suit under every provision of the Code, the application of § 106(c) was limited to those Code provisions containing the statutory trigger words. The House and Senate sponsors explained in floor statements:

> "The provision is included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective. Section 106(c) codifies in re Gwilliam, 519 F.2d 407 (9th Cir., 1975), and in re Dolard, 519 F.2d 282 (9th Cir., 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim. . . . [S]ubsection (c) is not limited to those issues, but permits the bankruptcy court to bind governmental units on other matters as well. For example, section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit; contrary language in the House report to H.R. 8200 is thereby over-

ruled." 124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards); *id.*, at 33993 (statement of Sen. DeConcini).

The sponsors later added:

"Section 547(b)(2) of the House amendment adopts a provision contained in the House bill and rejects an alternative contained in the Senate amendment relating to the avoidance of a preferential transfer that is payment of a tax claim owing to a governmental unit. As provided, section 106(c) of the House amendment overrules contrary language in the House report with the result that the Government is subject to avoidance of preferential transfers." *Id.*, at 32400 (statement of Rep. Edwards); *id.*, at 34000 (statement of Sen. DeConcini).

Although the primary object of § 106(c) was to provide the bankruptcy court with authority to determine the amount and dischargeability of tax liabilities even if a claim has not been filed, the legislative history thus indicates that the provision was also intended to cover "other matters as well," including specifically the avoidance of preferential transfers. There was no suggestion that this authority did not include the power to order the return of real property and the payment of money damages or that the issues that the bankruptcy court could determine under § 106(c) were limited to whether prospective or declaratory relief was appropriate.

The fact that paragraph (c) was added to the bill after paragraphs (a) and (b) had been reported out of Committee also explains why those paragraphs were not rewritten to eliminate any possible redundancy in the section. Given this history it is apparent that the initial phrase in paragraph (c) ("[e]xcept as provided in subsections (a) and (b)") constituted a declaration that the new subsection provided an additional mechanism by which the bankruptcy courts could bind States and did not derogate from the power granted under the other two subsections.

There is no question that § 106(c) effects a waiver of sovereign immunity. The statute, which applies to the Federal Government, the States, and municipalities alike, see 11 U. S. C. § 101(21), states in the clearest possible terms that provisions of the Code using any of the trigger words apply to governmental units "notwithstanding any assertion of sovereign immunity," and the legislative history supports that reading. It is well settled that when the Federal Government waives its sovereign immunity, the scope of that waiver is construed liberally to effect its remedial purposes. See *Block* v. *Neal*, 460 U. S. 289, 298 (1983); *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 554–555 (1951); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 709 (1949) (Frankfurter, J., dissenting); *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 59 (1944) (Frankfurter, J., dissenting); see also *Finley* v. *United States*, 490 U. S. 545, 578–580 (1989) (STEVENS, J., dissenting). The same rule should be applied under this section when the defendant is a State, rather than the Federal Government or a municipality. Cf. *Missouri* v. *Jenkins*, 491 U. S. 274, 281–282 (1989) (whether Congress intended an enhancement of a reasonable attorney's fee under § 1988 should not turn on whether the party against whom fee is awarded is a State). I would therefore hold that the determinations that a bankruptcy court may make under § 106(c) include a determination that a State must pay money damages under a Code provision containing one of the trigger words.

Syllabus

SABLE COMMUNICATIONS OF CALIFORNIA, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 88–515. Argued April 19, 1989—Decided June 23, 1989*

Section 223(b) of the Communications Act of 1934, as amended, bans indecent as well as obscene interstate commercial telephone messages, commonly known as "dial-a-porn." Under its predecessor provision—which sought to restrict minors' access to dial-a-porn—the Federal Communications Commission (FCC), after lengthy court proceedings, had promulgated regulations laying out means by which dial-a-porn sponsors could screen out underaged callers. Sable Communications of California, which offers sexually oriented prerecorded telephone messages to callers both in and outside the Los Angeles metropolitan area, brought suit in the District Court, claiming that § 223(b)'s obscenity and indecency provisions were unconstitutional, chiefly under the First and Fourteenth Amendments, and seeking an injunction enjoining the FCC and the Justice Department from initiating any criminal investigation or prosecution, civil action, or administrative proceeding under the statute and a declaratory judgment. The court denied Sable's request for a preliminary injunction against enforcement of the ban on obscene telephone messages, rejecting the argument that the statute was unconstitutional because it created a national standard of obscenity. However, it issued the injunction with regard to the indecent speech provision, holding that the provision was overbroad and unconstitutional because it was not narrowly drawn to achieve the legitimate state interest of protecting children from exposure to indecent dial-a-porn messages.

Held:

1. Section 223(b) does not unconstitutionally prohibit the interstate transmission of obscene commercial telephone messages. The protection of the First Amendment does not extend to obscene speech. In addition, § 223(b) does not contravene the "contemporary community standards" requirement of *Miller* v. *California*, 413 U. S. 15, since it no more establishes a "national standard" of obscenity than do federal statutes prohibiting the mailing of obscene materials or the broadcasting of

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*Together with No. 88–525, *Federal Communications Commission et al.* v. *Sable Communications of California, Inc.*, also on appeal from the same court.

obscene messages. There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. Sable, which has the burden of complying with the prohibition, is free to tailor its messages, on a selective basis, to the communities it chooses to serve. Pp. 124–126.

2. Section 223(b)'s ban on indecent telephone messages violates the First Amendment since the statute's denial of adult access to such messages far exceeds that which is necessary to serve the compelling interest of preventing minors from being exposed to the messages. *FCC* v. *Pacifica Foundation*, 438 U. S. 726, an emphatically narrow ruling giving the FCC power to regulate an indecent radio broadcast, is readily distinguishable from these cases. *Pacifica*, which did not involve a total ban on broadcasting indecent material, relied on the "unique" attributes of broadcasting, which can intrude on the privacy of the home without prior warning of content and which is uniquely accessible to children. In contrast, the dial-it medium requires the listener to take affirmative steps to receive the communications. The Government's argument that nothing less than a total ban could prevent children from gaining access to the messages and that this Court should defer to Congress' conclusions and factual findings to that effect is unpersuasive. There is no evidence to show that children would have evaded the rules that the FCC, after prolonged proceedings, had determined would keep the messages out of their reach. Moreover, deference to Congress' legislative findings cannot limit judicial inquiry where First Amendment rights are at stake. Here, the congressional record contains no legislative findings that would justify a conclusion that there are no constitutionally acceptable less restrictive means to achieve the Government's interest in protecting minors. Pp. 126–131.

692 F. Supp. 1208, affirmed.

WHITE, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and IV, and the opinion of the Court with respect to Part III, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 131. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 133.

Richard G. Taranto argued the cause for appellees in No. 88–515 and for appellants in No. 88–525. With him on the briefs were *Acting Solicitor General Bryson*, *Assistant Attorney General Bolton*, *Deputy Solicitor General Wallace*, *Barbara L. Herwig*, *Jacob M. Lewis*, and *Diane S. Killory*.

Laurence H. Tribe argued the cause for appellant in No. 88–515 and for appellee in No. 88–525. With him on the brief were *Brian Stuart Koukoutchos*, *Lawrence E. Abelman*, *Norman S. Beier*, *Richard K. Simon*, and *Lee L. Blackman.*†

JUSTICE WHITE delivered the opinion of the Court.

The issue before us is the constitutionality of § 223(b) of the Communications Act of 1934. 47 U. S. C. § 223(b) (1982 ed., Supp. V). The statute, as amended in 1988, imposes an outright ban on indecent as well as obscene interstate commercial telephone messages. The District Court upheld the prohibition against obscene interstate telephone communications for commercial purposes, but enjoined the enforcement of the statute insofar as it applied to indecent messages. We affirm the District Court in both respects.

I

In 1983, Sable Communications, Inc., a Los Angeles-based affiliate of Carlin Communications, Inc., began offering sexu-

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†Briefs of *amici curiae* were filed for Minority Members of the Committee on Energy and Commerce of the United States House of Representatives by *John J. Adams;* for Action for Children's Television et al. by *Timothy B. Dyk*, *Henry Geller*, *John A. Powell*, *C. Edwin Baker*, *Susan M. Liss*, *Jan G. Levine*, *Howard Monderer*, *Lois J. Schiffer*, *Karen Christensen*, *Andrew Jay Schwartzman*, *Paula A. Jameson*, *Nancy H. Hendry*, *J. Laurent Scharff*, *Jane E. Kirtley*, *Bruce W. Sanford*, and *Robert A. Beizer;* for the American Family Association, Inc., by *Peggy M. Coleman;* for the Association of Interactive Information Providers by *Earl Nicholas Selby* and *William Bennett Turner;* for Citizens for Decency through Law, Inc., by *Benjamin W. Bull;* for Home Box Office, Inc., by *Daniel M. Waggoner*, *Stuart R. Dunwoody*, and *Harold E. Akselrad;* for the Pacifica Foundation by *William J. Byrnes;* for Morality in Media, Inc., by *Paul J. McGeady;* for the San Francisco AIDS Foundation by *Leonard Graff;* for the United States Catholic Conference by *Mark E. Chopko;* for John W. Olivo, Jr., by *Robert T. Perry;* and for Jane Roe et al. by *Bruce J. Ennis.*

ally oriented prerecorded telephone messages[1] (popularly known as "dial-a-porn") through the Pacific Bell telephone network. In order to provide the messages, Sable arranged with Pacific Bell to use special telephone lines, designed to handle large volumes of calls simultaneously. Those who called the adult message number were charged a special fee. The fee was collected by Pacific Bell and divided between the phone company and the message provider. Callers outside the Los Angeles metropolitan area could reach the number by means of a long-distance toll call to the Los Angeles area code.

In 1988, Sable brought suit in District Court seeking declaratory and injunctive relief against enforcement of the recently amended § 223(b). The 1988 amendments to the statute imposed a blanket prohibition on indecent as well as obscene interstate commercial telephone messages. Sable brought this action to enjoin the Federal Communications Commission (FCC) and the Justice Department from initiating any criminal investigation or prosecution, civil action or administrative proceeding under the statute. Sable also sought a declaratory judgment, challenging the indecency and the obscenity provisions of the amended § 223(b) as unconstitutional, chiefly under the First and Fourteenth Amendments to the Constitution.

The District Court found that a concrete controversy existed and that Sable met the irreparable injury requirement for issuance of a preliminary injunction under *Elrod* v. *Burns*, 427 U. S. 347, 373 (1976). 692 F. Supp. 1208, 1209 (CD Cal. 1988). The District Court denied Sable's request for a preliminary injunction against enforcement of the statute's ban on obscene telephone messages, rejecting the argument that the statute was unconstitutional because it created a national standard of obscenity. The District Court, how-

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[1] A typical prerecorded message lasts anywhere from 30 seconds to two minutes and may be called by up to 50,000 people hourly through a single telephone number. Comment, Telephones, Sex, and the First Amendment, 33 UCLA L. Rev. 1221, 1223 (1986).

ever, struck down the "indecent speech" provision of § 223(b), holding that in this respect the statute was overbroad and unconstitutional and that this result was consistent with *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978). "While the government unquestionably has a legitimate interest in, *e. g.*, protecting children from exposure to indecent dial-a-porn messages, § 223(b) is not narrowly drawn to achieve any such purpose. Its flat-out ban of indecent speech is contrary to the First Amendment." 692 F. Supp., at 1209. Therefore, the court issued a preliminary injunction prohibiting enforcement of § 223(b) with respect to any communication alleged to be "indecent."

We noted probable jurisdiction on Sable's appeal of the obscenity ruling (No. 88–515); we also noted probable jurisdiction on the federal parties' cross-appeal of the preliminary injunction holding the statute unconstitutional with respect to its ban on indecent speech (No. 88–525). 488 U. S. 1003 (1989).[2]

II

While dial-a-porn services are a creature of this decade, the medium, in its brief history, has been the subject of much litigation and the object of a series of attempts at regula-

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[2] Sable appealed the District Court ruling to the Court of Appeals for the Ninth Circuit, concurrently filing an emergency motion for an injunction pending appeal. The District Court entered an order temporarily enjoining the FCC from enforcing the statute during the pendency of the appeal. After the federal parties filed their notice of appeal to this Court from the District Court's grant of the preliminary injunction as to "indecent" communication, the Court of Appeals for the Ninth Circuit entered an order directing Sable either to file a motion for voluntary dismissal or to show cause why the appeal should not be dismissed for lack of jurisdiction. Sable filed an *ex parte* application to this Court for an injunction pending appeal, as well as a return on the Court of Appeals' order to show cause. The Court of Appeals entered an order dismissing the appeal since the filing of a direct appeal by the FCC had the effect of transferring Sable's appeal to this Court.

tion.[3] The first litigation involving dial-a-porn was brought under 82 Stat. 112, 47 U. S. C. § 223, which proscribed knowingly "permitting a telephone under [one's] control" to be used to make "any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent." However, the FCC concluded in an administrative action that the existing law did not cover dial-a-porn. *In re Application for Review of Complaint Filed by Peter F. Cohalan*, FCC File No. E–83–14 (memorandum opinions and orders adopted May 13, 1983).

In reaction to that FCC determination, Congress made its first effort explicitly to address "dial-a-porn" when it added a subsection 223(b) to the 1934 Communications Act. The provision, which was the predecessor to the amendment at issue in this case, pertained directly to sexually oriented commercial telephone messages and sought to restrict the access of minors to dial-a-porn. The relevant provision of the Act, Federal Communications Commission Authorization Act of 1983, Pub. L. 98–214, § 8(b), 97 Stat. 1470, made it a crime to use telephone facilities to make "obscene or indecent" interstate telephone communications "for commercial purposes to any person under eighteen years of age or to any other person without that person's consent." 47 U. S. C. § 223(b)(1)(A) (1982 ed., Supp. V). The statute criminalized commercial transmission of sexually oriented communications to minors and required the FCC to promulgate regulations laying out the means by which dial-a-porn sponsors could screen out underaged callers. § 223(b)(2). The enactment provided that it would be a defense to prosecution that the defendant restricted access to adults only, in accordance with procedures established by the FCC. The statute did not criminal-

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[3] Dial-a-porn is big business. The dial-a-porn service in New York City alone received six to seven million calls a month for the 6-month period ending in April 1985. *Carlin Communications, Inc.* v. *FCC*, 787 F. 2d 846, 848 (CA2 1986).

ize sexually oriented messages to adults, whether the messages were obscene or indecent.

The FCC initially promulgated regulations that would have established a defense to message providers operating only between the hours of 9 p.m. and 8 a.m. eastern time (time channeling) and to providers requiring payment by credit card (screening) before transmission of the dial-a-porn message. Restrictions on Obscene or Indecent Telephone Message Services, 47 CFR § 64.201 (1988). In *Carlin Communications, Inc.* v. *FCC*, 749 F. 2d 113 (1984) *(Carlin I)*, the Court of Appeals for the Second Circuit set aside the time channeling regulations and remanded to the FCC to examine other alternatives, concluding that the operating hours requirement was "both overinclusive and underinclusive" because it denied "access to adults between certain hours, but not to youths who can easily pick up a private or public telephone and call dial-a-porn during the remaining hours." *Id.*, at 121. The Court of Appeals did not reach the constitutionality of the underlying legislation.

In 1985, the FCC promulgated new regulations which continued to permit credit card payment as a defense to prosecution. Instead of time restrictions, however, the Commission added a defense based on use of access codes (user identification codes). Thus, it would be a defense to prosecution under § 223(b) if the defendant, before transmission of the message, restricted customer access by requiring either payment by credit card or authorization by access or identification code. 50 Fed. Reg. 42699, 42705 (1985). The regulations required each dial-a-porn vendor to develop an identification code data base and implementation scheme. Callers would be required to provide an access number for identification (or a credit card) before receiving the message. The access code would be received through the mail after the message provider reviewed the application and concluded through a written age ascertainment procedure that the ap-

plicant was at least 18 years of age. The FCC rejected a proposal for "exchange blocking" which would block or screen telephone numbers at the customer's premises or at the telephone company offices. In *Carlin Communications, Inc.* v. *FCC*, 787 F. 2d 846 (CA2 1986) *(Carlin II)*, the Court of Appeals set aside the new regulations because of the FCC's failure adequately to consider customer premises blocking. Again, the constitutionality of the underlying legislation was not addressed.

The FCC then promulgated a third set of regulations, which again rejected customer premises blocking but added to the prior defenses of credit card payment and access code use a third defense: message scrambling. 52 Fed. Reg. 17760 (1987). Under this system, providers would scramble the message, which would then be unintelligible without the use of a descrambler, the sale of which would be limited to adults. On January 15, 1988, in *Carlin Communications, Inc.* v. *FCC*, 837 F. 2d 546 *(Carlin III)*, cert. denied, 488 U. S. 924 (1988), the Court of Appeals for the Second Circuit held that the new regulations, which made access codes, along with credit card payments and scrambled messages, defenses to prosecution under § 223(b) for dial-a-porn providers, were supported by the evidence, had been properly arrived at, and were a "feasible and effective way to serve" the "compelling state interest" in protecting minors, 837 F. 2d, at 555; but the Court directed the FCC to reopen proceedings if a less restrictive technology became available. The Court of Appeals, however, this time reaching the constitutionality of the statute, invalidated § 223(b) insofar as it sought to apply to nonobscene speech. *Id.*, at 560, 561.

Thereafter, in April 1988, Congress amended § 223(b) of the Communications Act to prohibit indecent as well as obscene interstate commercial telephone communications directed to any person regardless of age. The amended statute, which took effect on July 1, 1988, also eliminated the requirement that the FCC promulgate regulations for re-

stricting access to minors since a total ban was imposed on dial-a-porn, making it illegal for adults, as well as children, to have access to the sexually explicit messages, Pub. L. 100–297, 102 Stat. 424.[4] It was this version of the statute that was in effect when Sable commenced this action.[5]

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[4] "(b)(1) Whoever knowingly—

"(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

"(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),

"shall be fined not more than $50,000 or imprisoned not more than six months, or both."

[5] After Sable and the federal parties filed their jurisdictional statements with this Court, but before we noted probable jurisdiction, § 223(b) was again revised by Congress in § 7524 of the Child Protection and Obscenity Enforcement Act of 1988, § 7524, 102 Stat. 4502, which was enacted as Title VII, Subtitle N, of the Anti-Drug Abuse Act of 1988, Pub. L. 100–690 (codified at 47 U. S. C. § 223(b) (1988 ed.)). This most recent legislation, signed into law on November 18, 1988, places the prohibition against obscene commercial telephone messages in a subsection separate from that containing the prohibition against indecent messages. In addition, under the new law, the prohibition against obscene or indecent telephone messages is enforceable only through criminal penalties and no longer through administrative proceedings by the FCC.

Section 223(b) of the Communications Act of 1934, as amended by § 7524 of the Child Protection and Obscenity Enforcement Act of 1988, states in pertinent part:

"(b)(1) Whoever knowingly—

"(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

"(B) permits any telephone facility under such person's control to be used for an activity prohibited by clause (i),

"shall be fined in accordance with title 18 of the United States Code, or imprisoned not more than two years, or both.

"(2) Whoever knowingly—

"(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any

III

In the ruling at issue in No. 88–515, the District Court upheld § 223(b)'s prohibition of obscene telephone messages as constitutional. We agree with that judgment. In contrast to the prohibition on indecent communications, there is no constitutional barrier to the ban on obscene dial-a-porn recordings. We have repeatedly held that the protection of the First Amendment does not extend to obscene speech. See, *e. g.*, *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 69 (1973). The cases before us today do not require us to decide what is obscene or what is indecent but rather to determine whether Congress is empowered to prohibit transmission of obscene telephonic communications.

In its facial challenge to the statute, Sable argues that the legislation creates an impermissible national standard of obscenity, and that it places message senders in a "double bind" by compelling them to tailor all their messages to the least tolerant community.[6]

We do not read § 223(b) as contravening the "contemporary community standards" requirement of *Miller* v. *California*, 413 U. S. 15 (1973). Section 223(b) no more establishes a "national standard" of obscenity than do federal statutes

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indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

"(B) permits any telephone facility under such person's control to be used for an activity prohibited by clause (i),

"shall be fined not more than $50,000 or imprisoned not more than six months, or both." 102 Stat. 4502.

Since the substantive prohibitions under this amendment remain the same, this case is not moot.

[6] In its jurisdictional statement, Sable also argued that the prohibition on obscene calls is not severable from the ban on indecent messages. This last claim was not renewed in Sable's brief on the merits, presumably as a result of the subsequent modification of the statute in which Congress specifically placed the ban on obscene commercial telephone messages in a subsection separate from the prohibition against indecent messages. Thus, the severability question is no longer before us.

prohibiting the mailing of obscene materials, 18 U. S. C. § 1461, see *Hamling* v. *United States*, 418 U. S. 87 (1974), or the broadcasting of obscene messages, 18 U. S. C. § 1464. In *United States* v. *Reidel*, 402 U. S. 351 (1971), we said that Congress could prohibit the use of the mails for commercial distribution of materials properly classifiable as obscene, even though those materials were being distributed to willing adults who stated that they were adults. Similarly, we hold today that there is no constitutional stricture against Congress' prohibiting the interstate transmission of obscene commercial telephone recordings.

We stated in *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123 (1973), that the *Miller* standards, including the "contemporary community standards" formulation, apply to federal legislation. As we have said before, the fact that "distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." *Hamling* v. *United States*, *supra*, at 106.

Furthermore, Sable is free to tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve. While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages. Whether Sable chooses to hire operators to determine the source of the calls or engages with the telephone company to arrange for the screening and blocking of out-of-area calls or finds another means for providing messages compatible with community standards is a decision for the message provider to make. There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in

others. If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages.

IV

In No. 88–525, the District Court concluded that while the Government has a legitimate interest in protecting children from exposure to indecent dial-a-porn messages, § 223(b) was not sufficiently narrowly drawn to serve that purpose and thus violated the First Amendment. We agree.

Sexual expression which is indecent but not obscene is protected by the First Amendment; and the federal parties do not submit that the sale of such materials to adults could be criminalized solely because they are indecent. The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. *Ginsberg* v. *New York*, 390 U. S. 629, 639–640 (1968); *New York* v. *Ferber*, 458 U. S. 747, 756–757 (1982). The Government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. *Hynes* v. *Mayor of Oradell*, 425 U. S., at 620; *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786 (1978)." *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 637 (1980). It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.

In *Butler* v. *Michigan*, 352 U. S. 380 (1957), a unanimous Court reversed a conviction under a statute which made it an offense to make available to the general public materials

found to have a potentially harmful influence on minors. The Court found the law to be insufficiently tailored since it denied adults their free speech rights by allowing them to read only what was acceptable for children. As Justice Frankfurter said in that case, "[s]urely this is to burn the house to roast the pig." *Id.*, at 383. In our judgment, this case, like *Butler*, presents us with "legislation not reasonably restricted to the evil with which it is said to deal." *Ibid.*

In attempting to justify the complete ban and criminalization of the indecent commercial telephone communications with adults as well as minors, the federal parties rely on *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978), a case in which the Court considered whether the FCC has the power to regulate a radio broadcast that is indecent but not obscene. In an emphatically narrow holding, the *Pacifica* Court concluded that special treatment of indecent broadcasting was justified.

Pacifica is readily distinguishable from these cases, most obviously because it did not involve a total ban on broadcasting indecent material. The FCC rule was not "'intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.'" *Pacifica*, *supra*, at 733, quoting *Pacifica Foundation*, 59 F. C. C. 2d 892 (1976). The issue of a total ban was not before the Court. 438 U. S., at 750, n. 28.

The *Pacifica* opinion also relied on the "unique" attributes of broadcasting, noting that broadcasting is "uniquely pervasive," can intrude on the privacy of the home without prior warning as to program content, and is "uniquely accessible to children, even those too young to read." *Id.*, at 748–749. The private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in *Pacifica*. In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it

medium requires the listener to take affirmative steps to receive the communication. There is no "captive audience" problem here; callers will generally not be unwilling listeners. The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message. Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.

The Court in *Pacifica* was careful "to emphasize the narrowness of [its] holding." *Id.*, at 750. As we did in *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60 (1983), we distinguish *Pacifica* from the cases before us and reiterate that "the government may not 'reduce the adult population . . . to . . . only what is fit for children.'" 463 U. S., at 73, quoting *Butler* v. *Michigan*, *supra*, at 383.

The federal parties nevertheless argue that the total ban on indecent commercial telephone communications is justified because nothing less could prevent children from gaining access to such messages. We find the argument quite unpersuasive. The FCC, after lengthy proceedings, determined that its credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors. The Court of Appeals, after careful consideration, agreed that these rules represented a "feasible and effective" way to serve the Government's compelling interest in protecting children. 837 F. 2d, at 555.

The federal parties now insist that the rules would not be effective enough—that enterprising youngsters could and would evade the rules and gain access to communications from which they should be shielded. There is no evidence in the record before us to that effect, nor could there be since

the FCC's implementation of § 223(b) prior to its 1988 amendment has never been tested over time. In this respect, the federal parties assert that in amending § 223(b) in 1988, Congress expressed its view that there was not a sufficiently effective way to protect minors short of the total ban that it enacted. The federal parties claim that we must give deference to that judgment.

To the extent that the federal parties suggest that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution. This is particularly true where the Legislature has concluded that its product does not violate the First Amendment. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 843 (1978). The federal parties, however, also urge us to defer to the factual findings by Congress relevant to resolving the constitutional issue; they rely on *Walters* v. *National Association of Radiation Survivors*, 473 U. S. 305, 331, n. 12 (1985), and *Rostker* v. *Goldberg*, 453 U. S. 57, 72–73 (1981). Beyond the fact that whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law, our answer is that the congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors.

There is no doubt Congress enacted a total ban on both obscene and indecent telephone communications. But aside from conclusory statements during the debates by proponents of the bill,[7] as well as similar assertions in hearings on

[7] See *e. g.*, 134 Cong. Rec. 7331 (1988) (statement of Rep. Bliley); *id.*, at 7336 (statement of Rep. Coats); *id.*, at 7330 (statement of Rep. Hall; *id.*, at 7599 (statement of Sen. Hatch).

a substantially identical bill the year before, H. R. 1786,[8] that under the FCC regulations minors could still have access to dial-a-porn messages, the congressional record presented to us contains no evidence as to *how* effective or ineffective the FCC's most recent regulations were or might prove to be. It may well be that there is no fail-safe method of guaranteeing that never will a minor be able to access the dial-a-porn system. The bill that was enacted, however, was introduced on the floor; nor was there a committee report on the bill from which the language of the enacted bill was taken. No Congressman or Senator purported to present a considered judgment with respect to how often or to what extent minors could or would circumvent the rules and have access to dial-a-porn messages. On the other hand, in the hearings on H. R. 1786, the Committee heard testimony from the FCC and other witnesses that the FCC rules would be effective and should be tried out in practice.[9] Furthermore, at the conclusion of the hearing, the Chairman of the Subcommittee suggested consultation looking toward "drafting a piece of legislation that will pass constitutional muster, while at the same time providing for the practical relief which families and groups are looking for." Hearings, at 235. The bill never emerged from Committee.

For all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages.[10] If this is the case,

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[8] Telephone Decency Act of 1987: Hearing on H. R. 1786 before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 100th Cong., 1st Sess., 2, 15 (1987) (Rep. Bliley) (Hearings); *id.*, at 18 (Rep. Coats); *id.*, at 20 (Rep. Tauke).

These hearings were held while *Carlin III* was pending before the Court of Appeals for the Second Circuit.

[9] See, *e. g.*, Hearings, at 129, 130, 132–133, 195–196, 198–200, 230–231.

[10] In the Hearings on H. R. 1786, *id.*, at 231–232, the following colloquy occurred between Congressman Nielson and Mr. Ward, a United States Attorney interested in § 223(b) prosecutions:

it seems to us that § 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages. Under our precedents, § 223(b), in its present form, has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear. It is another case of "burn[ing] the house to roast the pig." *Butler* v. *Michigan*, 352 U. S., at 383.

Because the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny.

Accordingly, we affirm the judgment of the District Court in Nos. 88–515 and 88–525.

It is so ordered.

JUSTICE SCALIA, concurring.

I join the opinion of the Court, but add a few words. It should not be missed that we are making a value judgment with respect to the indecency portion of the statute. The conclusion of the reasoning in Part IV of our opinion is as follows:

> "For all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient

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"Mr. NIELSON. Let me ask the question I asked the previous panel. Do any of the current alternatives by the FCC—that is the access codes, the credit cards, or the scrambling—do any of those provide a foolproof way of limiting dial-a-porn access to adults only? Either of you.

"Mr. WARD. I think that—it's not foolproof, but I think the access code requirement and the screening option, both provide the means of dramatically reducing the number of calls from minors in the United States, almost eliminating them. So I think that it would be a very effective way to do it.

"Mr. NIELSON. But not foolproof?

"Mr. WARD. Not absolutely foolproof."

> young people would manage to secure access to such messages. If this is the case, it seems to us that § 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages." *Ante*, at 130–131.

We could as well have said:

> "We know from this record that the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be inadequate, since some enterprising and disobedient young people would manage to secure access to such messages. Since this is the case, it seems to us that § 223(b) is a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages."

I join the Court's opinion because I think it correct that a wholesale prohibition upon adult access to indecent speech cannot be adopted merely because the FCC's alternate proposal could be circumvented by as few children as the evidence suggests. But where a reasonable person draws the line in this balancing process—that is, how few children render the risk unacceptable—depends in part upon what mere "indecency" (as opposed to "obscenity") includes. The more narrow the understanding of what is "obscene," and hence the more pornographic what is embraced within the residual category of "indecency," the more reasonable it becomes to insist upon greater assurance of insulation from minors. So while the Court is unanimous on the reasoning of Part IV, I am not sure it is unanimous on the assumptions underlying that reasoning. I do not believe, for example, that any sort of sexual activity portrayed or enacted over the phone lines would fall outside of the obscenity portion of the statute that we uphold, and within the indecency portion that we strike down, so long as it appeals only to "normal, healthy sexual desires" as opposed to "shameful or morbid" ones. *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 498 (1985).

In joining Part IV, I do so with the understanding that its examination of the legislative history (*ante*, at 129–130) is merely meant to establish that no more there than anywhere else can data be found demonstrating the infeasibility of alternative means to provide (given the nature of this material) adequate protection of minors. I do not understand the Court to suggest that such data must have been before Congress in order for the law to be valid. Even though "[n]o Congressman or Senator purported to present a considered judgment" on infeasibility, *ante*, at 130, the law would be valid if infeasibility was true. Neither due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote.

Finally, I note that while we hold the Constitution prevents Congress from banning indecent speech in this fashion, we do not hold that the Constitution requires public utilities to carry it.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, concurring in part and dissenting in part.

I agree that a statute imposing criminal penalties for making, or for allowing others to use a telephone under one's control to make, any indecent telephonic communication for a commercial purpose is patently unconstitutional. I therefore join Parts I, II, and IV of the Court's opinion.

In my view, however, 47 U. S. C. § 223(b)(1)(A)'s parallel criminal prohibition with regard to obscene commercial communications likewise violates the First Amendment. I have long been convinced that the exaction of criminal penalties for the distribution of obscene materials to consenting adults is constitutionally intolerable. In my judgment, "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt

to suppress unprotected speech, and to avoid very costly institutional harms." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 103 (1973) (BRENNAN, J., dissenting). To be sure, the Government has a strong interest in protecting children against exposure to pornographic material that might be harmful to them. *New York* v. *Ferber*, 458 U. S. 747, 775–777 (1982) (BRENNAN, J., concurring in judgment); *Ginsberg* v. *New York*, 390 U. S. 629 (1968). But a complete criminal ban on obscene telephonic messages for profit is "unconstitutionally overbroad, and therefore invalid on its face," as a means for achieving this end. *Miller* v. *California*, 413 U. S. 15, 47 (1973) (BRENNAN, J., dissenting).

The very evidence the Court adduces to show that denying adults access to all indecent commercial messages "far exceeds that which is necessary to limit the access of minors to such messages," *ante*, at 131, also demonstrates that forbidding the transmission of all obscene messages is unduly heavyhanded. After painstaking scrutiny, both the FCC and the Second Circuit found that "a scheme involving access codes, scrambling, and credit card payment is a feasible and effective way to serve this compelling state interest" in safeguarding children. *Carlin Communications, Inc.* v. *FCC*, 837 F. 2d 546, 555, cert. denied, 488 U. S. 924 (1988). And during the 1987 hearings on H. R. 1786, a United States attorney speaking on behalf of the Justice Department described the FCC's proposed regulations as "very effective," because they would "dramatically reduc[e] the number of calls from minors in the United States, almost eliminating them." Telephone Decency Act of 1987: Hearings on H. R. 1786 before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 100th Cong., 1st Sess., 231 (1987). In addition, as the Court notes, *ante*, at 129–130, no contrary evidence was before Congress when it voted to impose a total prohibition on obscene telephonic messages for profit. Hence, the federal parties cannot plausibly claim that their legitimate interest

in protecting children warrants this Draconian restriction on the First Amendment rights of adults who seek to hear the messages that Sable and others provide.

Section 223(b)(1)(A) unambiguously proscribes all obscene commercial messages, and thus admits of no construction that would render it constitutionally permissible. Because this criminal statute curtails freedom of speech far more radically than the Government's interest in preventing harm to minors could possibly license on the record before us, I would reverse the District Court's decision in No. 88–515 and strike down the statute on its face. Accordingly, I dissent from Part III of the Court's opinion.

UNITED STATES DEPARTMENT OF JUSTICE *v.* TAX ANALYSTS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88–782. Argued April 24, 1989—Decided June 23, 1989

The Tax Division of the Department of Justice (Department) represents the Federal Government in nearly all civil tax cases in the district courts, the courts of appeals, and the Claims Court, and receives copies of all opinions and orders issued by those courts in such cases. Respondent publishes a weekly magazine containing summaries of recent federal-court tax decisions, supplemented by full texts of those decisions in microfiche form. Respondent also publishes a daily electronic data base that includes summaries and full texts of recent federal-court tax decisions. After the Department denied its request under the Freedom of Information Act (FOIA) to make available all district court tax opinions and final orders received by the Tax Division in a certain period, respondent appealed administratively. While the appeal was pending, respondent agreed to withdraw its request in return for access to the Tax Division's weekly log of federal-court tax cases. Eventually, however, respondent became frustrated with the process of obtaining copies of decisions from district court clerks and initiated a series of new FOIA requests for copies of all district court opinions and final orders identified in the Tax Division's weekly logs. The Department denied these requests and, on administrative appeal, sustained the denial. Respondent then filed suit in District Court seeking to compel the Department to provide it with access to district court decisions received by the Tax Division. The District Court granted the Department's motion to dismiss the complaint, holding that 5 U. S. C. § 552(a)(4)(B), which confers jurisdiction in district courts when "agency records" have been "improperly withheld," had not been satisfied. The court reasoned that the decisions sought had not been "improperly withheld" because they were already available from their primary source, the district courts. The Court of Appeals reversed, holding that the decisions were "improperly withheld" and were "agency records" for purposes of the FOIA.

Held: The FOIA requires the Department to make available copies of district court decisions it receives in the course of litigating tax cases. Pp. 142–155.

(a) The requested district court decisions are "agency records." The Department obtained those documents from the district courts and was in control of the documents when the requests were made. Pp. 143–148.

(b) When the Department refused to comply with respondent's requests, it "withheld" the district court decisions for purposes of § 552(a)(4)(B), notwithstanding that the decisions were publicly available from the original source as soon as they were issued. Pp. 148–150.

(c) The district court decisions were "improperly" withheld despite their public availability at the original source, since they did not fall within any of the enumerated exemptions to the FOIA's disclosure requirements. While under § 552(a)(3) an agency need not make available materials that have already been disclosed under §§ 552(a)(1) and (a)(2), these latter subsections are limited to situations in which the requested materials have been previously published or made available by the *agency itself*. That disclosure of district court decisions may be partially governed by other statutes, in particular 28 U. S. C. § 1914, and by rules of the Judicial Conference of the United States, does not entitle the Department to claim that the requested district court decisions were not "improperly" withheld, since Congress has enacted no provision authorizing an agency to refuse to disclose materials whose disclosure is *mandated* by another statute. Moreover, the decision in *GTE Sylvania, Inc.* v. *Consumers Union of United States, Inc.*, 445 U. S. 375, that agency records enjoined from disclosure by a district court were not "improperly" withheld even though they did not fall within any of the enumerated exemptions, was not meant to be an invitation to courts in every case to engage in balancing, based on public availability and other factors, to determine whether there has been an unjustified denial of information. The FOIA invests courts with neither the authority nor the tools to make such determinations. Pp. 150–155.

269 U. S. App. D. C. 315, 845 F. 2d 1060, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. WHITE, J., concurred in the judgment. BLACKMUN, J., filed a dissenting opinion, *post*, p. 156.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were *Acting Solicitor General Bryson, Acting Assistant Attorney General Knapp, Roy T. Englert, Jr., Jonathan S. Cohen,* and *Mary Frances Clark.*

William A. Dobrovir argued the cause and filed a brief for respondent.*

**Jane E. Kirtley* filed a brief for the Reporters Committee for Freedom of the Press as *amicus curiae* urging affirmance.

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether the Freedom of Information Act (FOIA or Act), 5 U. S. C. § 552 (1982 ed. and Supp. V), requires the United States Department of Justice (Department) to make available copies of district court decisions that it receives in the course of litigating tax cases on behalf of the Federal Government. We hold that it does.

I

The Department's Tax Division represents the Federal Government in nearly all civil tax cases in the district courts, the courts of appeals, and the Claims Court. Because it represents a party in litigation, the Tax Division receives copies of all opinions and orders issued by these courts in such cases. Copies of these decisions are made for the Tax Division's staff attorneys. The original documents are sent to the official files kept by the Department.

If the Government has won a district court case, the Tax Division must prepare a bill of costs and collect any money judgment indicated in the decision. If the Government has lost, the Tax Division must decide whether to file a motion to alter or amend the judgment or whether to recommend filing an appeal. The decision whether to appeal involves not only the Tax Division but also the Internal Revenue Service (IRS) and the Solicitor General. A division of the IRS reviews the district court's decision and prepares a recommendation on whether an appeal should be taken. The court decision and the accompanying recommendation are circulated to the Tax Division, which formulates its own recommendation, and then to the Solicitor General, who reviews the district court decision in light of the IRS and Tax Division's recommendations. If the Solicitor General ultimately approves an appeal, the Tax Division prepares a record and joint appendix, both of which must contain a copy of the district court decision, for transmittal to the court of appeals. If no appeal is

taken, the Tax Division is responsible for ensuring the payment of any court-ordered refund and for defending against any claim for attorney's fees.

Respondent Tax Analysts publishes a weekly magazine, Tax Notes, which reports on legislative, judicial, and regulatory developments in the field of federal taxation to a readership largely composed of tax attorneys, accountants, and economists. As one of its regular features, Tax Notes provides summaries of recent federal-court decisions on tax issues. To supplement the magazine, Tax Analysts provides full texts of these decisions in microfiche form. Tax Analysts also publishes Tax Notes Today, a daily electronic data base that includes summaries and full texts of recent federal-court tax decisions.

In late July 1979, Tax Analysts filed a FOIA request in which it asked the Department to make available all district court tax opinions and final orders received by the Tax Division earlier that month.[1] The Department denied the request on the ground that these decisions were not Tax Division records. Tax Analysts then appealed this denial administratively. While the appeal was pending, Tax Analysts agreed to withdraw its request in return for access to the Tax Division's weekly log of tax cases decided by the federal courts. These logs list the name and date of a case, the docket number, the names of counsel, the nature of the case, and its disposition.

Since gaining access to the weekly logs, Tax Analysts' practice has been to examine the logs and to request copies of the decisions noted therein from the clerks of the 90 or so district courts around the country and from participating attorneys. In most instances, Tax Analysts procures copies reasonably promptly, but this method of acquisition has proven

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[1] Tax Analysts also requested copies of tax decisions received from the Claims Court and the courts of appeals. Decisions from these courts are not at issue in this case.

unsatisfactory approximately 25% of the time. Some court clerks ignore Tax Analysts' requests for copies of decisions, and others respond slowly, sometimes only after Tax Analysts has forwarded postage and copying fees. Because the Federal Government is required to appeal tax cases within 60 days, Tax Analysts frequently fails to obtain copies of district court decisions before appeals are taken.

Frustrated with this process, Tax Analysts initiated a series of new FOIA requests in 1984. Beginning in November 1984, and continuing approximately once a week until May 1985, Tax Analysts asked the Department to make available copies of all district court tax opinions and final orders identified in the Tax Division's weekly logs. The Department denied these requests and Tax Analysts appealed administratively. When the Department sustained the denial, Tax Analysts filed the instant suit in the United States District Court for the District of Columbia, seeking to compel the Department to provide it with access to district court decisions received by the Tax Division.

The District Court granted the Department's motion to dismiss the complaint, holding that 5 U. S. C. § 552(a)(4)(B), which confers jurisdiction in the district courts when "agency records" have been "improperly withheld,"[2] had not been satisfied. 643 F. Supp. 740, 742 (1986). The court reasoned that the district court decisions at issue had not been "improperly withheld" because they "already are available from

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[2] Section 552(a)(4)(B) provides:

"On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."

their primary sources, the District Courts," *id.*, at 743, and thus were "on the public record." *Id.*, at 744. The court did not address whether the district court decisions are "agency records." *Id.*, at 742.

The Court of Appeals for the District of Columbia Circuit reversed. 269 U. S. App. D. C. 315, 845 F. 2d 1060 (1988). It first held that the district court decisions were "improperly withheld." An agency ordinarily may refuse to make available documents in its control only if it proves that the documents fall within one of the nine disclosure exemptions set forth in § 552(b), the court noted, and in this instance, "[n]o exemption applies to the district court opinions." *Id.*, at 319, 845 F. 2d, at 1064. As for the Department's contention that the district court decisions are publicly available at their source, the court observed that "no court . . . has denied access to . . . documents on the ground that they are available elsewhere, and several have assumed that such documents must still be produced by the agency unless expressly exempted by the Act." *Id.*, at 321, 845 F. 2d, at 1066.

The Court of Appeals next held that the district court decisions sought by Tax Analysts are "agency records" for purposes of the FOIA. The court acknowledged that the district court decisions had originated in a part of the Government not covered by the FOIA, but concluded that the documents nonetheless constituted "agency records" because the Department has the discretion to use the decisions as it sees fit, because the Department routinely uses the decisions in performing its official duties, and because the decisions are integrated into the Department's official case files. *Id.*, at 323–324, 845 F. 2d, at 1068–1069. The court therefore remanded the case to the District Court with instructions to enter an order directing the Department "to provide some reasonable form of access" to the decisions sought by Tax Analysts. *Id.*, at 317, 845 F. 2d, at 1062.

We granted certiorari, 488 U. S. 1003 (1989), and now affirm.

II

In enacting the FOIA 23 years ago, Congress sought "'to open agency action to the light of public scrutiny.'" *Department of Justice* v. *Reporters Committee for Freedom of Press*, 489 U. S. 749, 772 (1989), quoting *Department of Air Force* v. *Rose*, 425 U. S. 352, 372 (1976). Congress did so by requiring agencies to adhere to "'a general philosophy of full agency disclosure.'" *Id.*, at 360, quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). Congress believed that this philosophy, put into practice, would help "ensure an informed citizenry, vital to the functioning of a democratic society." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 242 (1978).

The FOIA confers jurisdiction on the district courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." § 552(a)(4)(B). Under this provision, "federal jurisdiction is dependent on a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'" *Kissinger* v. *Reporters Committee for Freedom of Press*, 445 U. S. 136, 150 (1980). Unless each of these criteria is met, a district court lacks jurisdiction to devise remedies to force an agency to comply with the FOIA's disclosure requirements.[3]

In this case, all three jurisdictional terms are at issue. Although these terms are defined neither in the Act nor in its legislative history, we do not write on a clean slate. Nine Terms ago we decided three cases that explicated the meanings of these partially overlapping terms. *Kissinger* v. *Reporters Committee for Freedom of Press*, *supra*; *Forsham* v.

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[3] The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not "agency records" or have not been "improperly" "withheld." See S. Rep. No. 813, 89th Cong., 1st Sess., 8 (1965) ("Placing the burden of proof upon the agency puts the task of justifying the withholding on the only party able to explain it"); H. R. Rep. No. 1497, 89th Cong., 2d Sess., 9 (1966) (same); cf. *Federal Open Market Committee* v. *Merrill*, 443 U. S. 340, 352 (1979).

Harris, 445 U. S. 169 (1980); *GTE Sylvania, Inc.* v. *Consumers Union of United States, Inc.*, 445 U. S. 375 (1980). These decisions form the basis of our analysis of Tax Analysts' requests.

A

We consider first whether the district court decisions at issue are "agency records," a term elaborated upon both in *Kissinger* and in *Forsham*. *Kissinger* involved three separate FOIA requests for written summaries of telephone conversations in which Henry Kissinger had participated when he served as Assistant to the President for National Security Affairs from 1969 to 1975, and as Secretary of State from 1973 to 1977. Only one of these requests—for summaries of specific conversations that Kissinger had had during his tenure as National Security Adviser—raised the "agency records" issue. At the time of this request, these summaries were stored in Kissinger's office at the State Department in his personal files. We first concluded that the summaries were not "agency records" at the time they were made because the FOIA does not include the Office of the President in its definition of "agency." 445 U. S., at 156. We further held that these documents did not acquire the status of "agency records" when they were removed from the White House and transported to Kissinger's office at the State Department, a FOIA-covered agency:

> "We simply decline to hold that the physical location of the notes of telephone conversations renders them 'agency records.' The papers were not in the control of the State Department at any time. They were not generated in the State Department. They never entered the State Department's files, and they were not used by the Department for any purpose. If mere physical location of papers and materials could confer status as an 'agency record' Kissinger's personal books, speeches, and all other memorabilia stored in his office would have

been agency records subject to disclosure under the FOIA." *Id.*, at 157.

Forsham, in turn, involved a request for raw data that formed the basis of a study conducted by a private medical research organization. Although the study had been funded through federal agency grants, the data never passed into the hands of the agencies that provided the funding, but instead was produced and possessed at all times by the private organization. We recognized that "[r]ecords of a nonagency certainly could become records of an agency as well," 445 U. S., at 181, but the fact that the study was financially supported by a FOIA-covered agency did not transform the source material into "agency records." Nor did the agencies' right of access to the materials under federal regulations change this result. As we explained, "the FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained." *Id.*, at 186 (emphasis in original; footnote omitted).

Two requirements emerge from *Kissinger* and *Forsham*, each of which must be satisfied for requested materials to qualify as "agency records." First, an agency must "either create or obtain" the requested materials "as a prerequisite to its becoming an 'agency record' within the meaning of the FOIA." *Id.*, at 182. In performing their official duties, agencies routinely avail themselves of studies, trade journal reports, and other materials produced outside the agencies both by private and governmental organizations. See *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 292 (1979). To restrict the term "agency records" to materials generated internally would frustrate Congress' desire to put within public reach the information available to an agency in its decision-making processes. See *id.*, at 290, n. 10. As we noted in *Forsham*, "The legislative history of the FOIA abounds with

. . . references to records *acquired* by an agency." 445 U. S., at 184 (emphasis added).[4]

Second, the agency must be in control of the requested materials at the time the FOIA request is made. By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties. This requirement accords with *Kissinger*'s teaching that the term "agency records" is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency. See 445 U. S., at 157. This requirement is suggested by *Forsham* as well, 445 U. S., at 183, where we looked to the definition of agency records in the Records Disposal Act, 44 U. S. C. § 3301. Under that definition, agency records include "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government *under Federal law or in connection with the transaction of public business* . . . ." *Ibid.* (emphasis added).[5] Furthermore, the requirement that the materials

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[4] Title 5 U. S. C. § 552(b)(4), which exempts from disclosure trade secrets and commercial or financial information "obtained from a person," provides further support for the principle that the term "agency records" includes materials received by an agency. See *Forsham*, 445 U. S., at 184–185; see also *id.*, at 183–184 (noting that the definition of "records" in the Records Disposal Act, 44 U. S. C. § 3301, and in the Presidential Records Act of 1978, 44 U. S. C. § 2201(2), encompassed materials "received" by an agency).

[5] In *GTE Sylvania, Inc.* v. *Consumers Union of United States, Inc.*, 445 U. S. 375, 385 (1980), we noted that Congress intended the FOIA to prevent agencies from refusing to disclose, among other things, agency telephone directories and the names of agency employees. We are confident, however, that requests for documents of this type will be relatively infrequent. Common sense suggests that a person seeking such documents or materials housed in an agency library typically will find it easier to repair to the Library of Congress, or to the nearest public library, rather than to invoke the FOIA's disclosure mechanisms. Cf. *Department*

be in the agency's control at the time the request is made accords with our statement in *Forsham* that the FOIA does not cover "information in the abstract." 445 U. S., at 185.[6]

Applying these requirements here, we conclude that the requested district court decisions constitute "agency records." First, it is undisputed that the Department has obtained these documents from the district courts. This is not a case like *Forsham*, where the materials never in fact had been received by the agency. The Department contends that a district court is not an "agency" under the FOIA, but this truism is beside the point. The relevant issue is whether an agency covered by the FOIA has "create[d] or obtaine[d]" the materials sought, *Forsham*, 445 U. S., at 182, not whether the organization from which the documents originated is itself covered by the FOIA.[7]

Second, the Department clearly controls the district court decisions that Tax Analysts seeks. Each of Tax Analysts' FOIA requests referred to district court decisions in the agency's possession at the time the requests were made.

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of Justice v. *Reporters Committee for Freedom of Press*, 489 U. S. 749, 764 (1989) ("[I]f the [requested materials] were 'freely available,' there would be no reason to invoke the FOIA to obtain access"). To the extent such requests are made, the fact that the FOIA allows agencies to recoup the costs of processing requests from the requester may discourage recourse to the FOIA where materials are readily available elsewhere. See 5 U. S. C. § 552(a)(4)(A).

[6] Because requested materials ordinarily will be in the agency's possession at the time the FOIA request is made, disputes over control should be infrequent. In some circumstances, however, requested materials might be on loan to another agency, "purposefully routed . . . out of agency possession in order to circumvent [an impending] FOIA request," or "wrongfully removed by an individual after a request is filed." *Kissinger* v. *Reporters Committee for Freedom of Press*, 445 U. S. 136, 155, n. 9 (1980). We leave consideration of these issues to another day.

[7] This point is implicit in *Department of Justice* v. *Julian*, 486 U. S. 1, 7, and n. 6 (1988), where it was uncontroverted that presentence reports, which had been prepared under district court auspices and turned over to the Department and the Parole Commission, constituted "agency records."

This is evident from the fact that Tax Analysts based its weekly requests on the Tax Division's logs, which compile information on decisions the Tax Division recently had received and placed in official case files. Furthermore, the court decisions at issue are obviously not personal papers of agency employees. The Department counters that it does not control these decisions because the district courts retain authority to modify the decisions even after they are released, but this argument, too, is beside the point. The control inquiry focuses on an agency's possession of the requested materials, not on its power to alter the content of the materials it receives. Agencies generally are not at liberty to alter the content of the materials that they receive from outside parties. An authorship-control requirement thus would sharply limit "agency records" essentially to documents generated by the agencies themselves. This result is incompatible with the FOIA's goal of giving the public access to all nonexempted information received by an agency as it carries out its mandate.

The Department also urges us to limit "agency records," at least where materials originating outside the agency are concerned, "to those documents 'prepared substantially to be relied upon in agency decisionmaking.'" Brief for Petitioner 21, quoting *Berry* v. *Department of Justice*, 733 F. 2d 1343, 1349 (CA9 1984). This limitation disposes of Tax Analysts' requests, the Department argues, because district court judges do not write their decisions primarily with an eye toward agency decisionmaking. This argument, however, makes the determination of "agency records" turn on the intent of the creator of a document relied upon by an agency. Such a *mens rea* requirement is nowhere to be found in the Act.[8] Moreover, discerning the intent of the drafters of a

[8] Nonpersonal materials in an agency's possession may be subject to certain disclosure restrictions. This fact, however, does not bear on whether the materials are in the agency's control, but rather on the subsequent question whether they are exempted from disclosure under § 552(b)(3).

document may often prove an elusive endeavor, particularly if the document was created years earlier or by a large number of people for whom it is difficult to divine a common intent.

B

We turn next to the term "withheld," which we discussed in *Kissinger*. Two of the requests in that case—for summaries of all the telephone conversations in which Kissinger had engaged while serving as National Security Adviser and as Secretary of State—implicated that term. These summaries were initially stored in Kissinger's personal files at the State Department. Near the end of his tenure as Secretary of State, Kissinger transferred the summaries first to a private residence and then to the Library of Congress. Significantly, the two requests for these summaries were made only after the summaries had been physically delivered to the Library. We found this fact dispositive, concluding that Congress did not believe that an agency "withholds a document which has been removed from the possession of the agency prior to the filing of the FOIA request. In such a case, the agency has neither the custody nor control necessary to enable it to withhold." 445 U. S., at 150–151.[9] We accordingly refused to order the State Department to institute a retrieval action against the Library. As we explained, such a course "would have us read the 'hold' out of 'withhold. . . . A refusal to resort to legal remedies to obtain possession is simply not conduct subsumed by the verb withhold.'" *Id.*, at 151.[10]

[9] Although a control inquiry for "withheld" replicates part of the test for "agency records," the FOIA's structure and legislative history make clear that agency control over requested materials is a "prerequisite to triggering *any* duties under the FOIA." *Kissinger*, 445 U. S., at 151 (emphasis added); see also *id.*, at 152–153; *Forsham* v. *Harris*, 445 U. S. 169, 185 (1980).

[10] *Kissinger*'s focus on the agency's present control of a requested document was based in part on the Act's purposes and structure. With respect to the former, we noted that because Congress had not intended to "obli-

The construction of "withholding" adopted in *Kissinger* readily encompasses Tax Analysts' requests. There is no claim here that Tax Analysts filed its requests for copies of recent district court tax decisions received by the Tax Division after these decisions had been transferred out of the Department. On the contrary, the decisions were on the Department's premises and otherwise in the Department's control, *supra*, at 146–147, when the requests were made. See n. 6, *supra*. Thus, when the Department refused to comply with Tax Analysts' requests, it "withheld" the district court decisions for purposes of § 552(a)(4)(B).

The Department's counterargument is that, because the district court decisions sought by Tax Analysts are publicly available as soon as they are issued and thus may be inspected and copied by the public at any time, the Department cannot be said to have "withheld" them. The Department notes that the weekly logs it provides to Tax Analysts contain sufficient information to direct Tax Analysts to the "original source of the requested documents." Brief for Petitioner 23. It is not clear from the Department's brief whether this argument is based on the term "withheld" or the term "improperly."[11] But, to the extent the Department relies on the

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gate agencies to create or retain documents," an agency should not be "required to retrieve documents which have escaped its possession, but which it has not endeavored to recover." 445 U. S., at 152 (citations omitted). As for the Act's structure, we noted that, among other provisions, § 552(a)(6)(B) gives agencies a 10-day extension of the normal 10-day period for responding to FOIA requests if there is a need to search and collect the requested materials from facilities separate from the office processing the request. The brevity of this extension period indicates that Congress did not expect agencies to resort to lawsuits to retrieve documents within that period. See *id.*, at 153.

[11] The Court of Appeals believed that the Department was arguing "that it need not affirmatively make [the district court decisions] available to Tax Analysts because the documents have not been *withheld* to begin with." 269 U. S. App. D. C. 315, 319–320, 845 F. 2d 1060, 1064–1065 (1988) (emphasis in original).

former term, its argument is without merit. Congress used the word "withheld" only "in its usual sense." *Kissinger*, 445 U. S., at 151. When the Department refused to grant Tax Analysts' requests for the district court decisions in its files, it undoubtedly "withheld" these decisions in any reasonable sense of that term. Nothing in the history or purposes of the FOIA counsels contorting this word beyond its usual meaning. We therefore reject the Department's argument that an agency has not "withheld" a document under its control when, in denying an otherwise valid request, it directs the requester to a place outside of the agency where the document may be publicly available.

C

The Department is left to argue, finally, that the district court decisions were not "improperly" withheld because of their public availability. The term "improperly," like "agency records" and "withheld," is not defined by the Act. We explained in *GTE Sylvania*, however, that Congress' use of the word "improperly" reflected its dissatisfaction with § 3 of the Administrative Procedure Act, 5 U. S. C. § 1002 (1964 ed.), which "had failed to provide the desired access to information relied upon in Government decisionmaking, and in fact had become 'the major statutory excuse for withholding Government records from public view.'" 445 U. S., at 384, quoting H. R. Rep. No. 1497, 89th Cong., 2d Sess., 3 (1966). Under § 3, we explained, agencies had "broad discretion . . . in deciding what information to disclose, and that discretion was often abused." 445 U. S., at 385.

In enacting the FOIA, Congress intended "to curb this apparently unbridled discretion" by "clos[ing] the 'loopholes which allow agencies to deny legitimate information to the public.'" *Ibid.* (citation omitted); see also *EPA* v. *Mink*, 410 U. S. 73, 79 (1973). Toward this end, Congress formulated a system of clearly defined exemptions to the FOIA's otherwise mandatory disclosure requirements. An agency must disclose agency records to any person under § 552(a), "unless

they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b)." *Department of Justice* v. *Julian*, 486 U. S. 1, 8 (1988). Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass. See, *e. g.*, *ibid.*; *FBI* v. *Abramson*, 456 U. S. 615, 630 (1982). More important for present purposes, the exemptions are "explicitly exclusive." *FAA Administrator* v. *Robertson*, 422 U. S. 255, 262 (1975); see also *Rose*, 425 U. S., at 361; *Robbins Tire & Rubber Co.*, 437 U. S., at 221; *Mink*, *supra*, at 79. As JUSTICE O'CONNOR has explained, Congress sought "to insulate its product from judicial tampering and to preserve the emphasis on disclosure by admonishing that the 'availability of records to the public' is not limited, 'except as *specifically* stated.'" *Abramson*, *supra*, at 642 (dissenting opinion) (emphasis in original), quoting § 552(c) (now codified at § 552(d)); see also 456 U. S., at 637, n. 5; H. R. Rep. No. 1497, *supra*, at 1. It follows from the exclusive nature of the § 552(b) exemption scheme that agency records which do not fall within one of the exemptions are "improperly" withheld.[12]

The Department does not contend here that any exemption enumerated in § 552(b) protects the district court decisions sought by Tax Analysts. The Department claims nonetheless that there is nothing "improper" in directing a requester "to the principal, public source of records." Brief for Petitioner 26. The Department advances three somewhat re-

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[12] Even when an agency does not deny a FOIA request outright, the requesting party may still be able to claim "improper" withholding by alleging that the agency has responded in an inadequate manner. Cf. § 552(a)(6)(C); *Kissinger* v. *Reporters Committee for Freedom of Press*, 445 U. S., at 166 (STEVENS, J., concurring in part and dissenting in part). No such claim is made in this case. Indeed, Tax Analysts does not dispute the Court of Appeals' conclusion that the Department could satisfy its duty of disclosure simply by making the relevant district court opinions available for copying in the public reference facility that it maintains. See 269 U. S. App. D. C., at 321–322, and n. 15, 845 F. 2d, at 1066–1067, and n. 15.

lated arguments in support of this proposition. We consider them in turn.

First, the Department contends that the structure of the Act evinces Congress' desire to avoid redundant disclosures. An understanding of this argument requires a brief survey of the disclosure provisions of § 552(a). Under subsection (a)(1), an agency must "currently publish in the Federal Register" specific materials, such as descriptions of the agency, statements of its general functions, and the agency's rules of procedure. Under subsection (a)(2), an agency must "make available for public inspection and copying" its final opinions, policy statements, and administrative staff manuals, "unless the materials are promptly published and copies offered for sale." Under subsection (a)(3), the general provision covering the disclosure of agency records, an agency need not make available those materials that have already been disclosed under subsections (a)(1) and (a)(2). Taken together, the Department argues, these provisions demonstrate the inapplicability of the FOIA's disclosure requirements to previously disclosed, publicly available materials. "*A fortiori*, a judicial record that is a public document should not be subject to a FOIA request." *Id.*, at 29.

The Department's argument proves too much. The disclosure requirements set out in subsections (a)(1) and (a)(2) are carefully limited to situations in which the requested materials have been previously published or made available by the *agency itself*. It is one thing to say that an agency need not disclose materials that it has previously released; it is quite another to say that an agency need not disclose materials that some other person or group may have previously released. Congress undoubtedly was aware of the redundancies that might exist when requested materials have been previously made available. It chose to deal with that problem by crafting only narrow categories of materials which need not be, in effect, disclosed twice *by the agency*. If Congress had wished to codify an exemption for all publicly available ma-

terials, it knew perfectly well how to do so. It is not for us to add or detract from Congress' comprehensive scheme, which already "balances, and protects all interests" implicated by Executive Branch disclosure. *Mink*, *supra*, at 80, quoting S. Rep. No. 813, 89th Congress, 1st Sess., 3 (1965).[13]

It is not surprising, moreover, that Congress declined to exempt all publicly available materials from the FOIA's disclosure requirements. In the first place, such an exemption would engender intractable fights over precisely what constitutes public availability, unless the term were defined with precision. In some sense, nearly all of the information that comes within an agency's control can be characterized as publicly available. Although the form in which this material comes to an agency—*i. e.*, a report or testimony—may not be generally available, the information included in that report or testimony may very well be. Even if there were some agreement over what constitutes publicly available materials, Congress surely did not envision agencies satisfying their disclosure obligations under the FOIA simply by handing requesters a map and sending them on scavenger expeditions throughout the Nation. Without some express indication in the Act's text or legislative history that Congress intended such a result, we decline to adopt this reading of the statute.

The Department's next argument rests on the fact that the disclosure of district court decisions is partially governed by other statutes, in particular 28 U. S. C. § 1914, and by rules

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[13] The obligations imposed under subsections (a)(1) and (a)(2) are not properly viewed as additions to the disclosure exemptions set out in subsection (b). If an agency refuses to disclose agency records that indisputably fall within one of the subsection (b) exemptions, the agency has "withheld" the records, albeit not "improperly" given the legislative authorization to do so. By contrast, once an agency has complied with the subsection (a)(1) and (a)(2) obligations, it can no longer be charged with "withholding" the relevant records.

set by the Judicial Conference of the United States. The FOIA does not compel disclosure of district court decisions, the Department contends, because these other provisions are "more precisely drawn to govern the provision of court records to the general public." Brief for Petitioner 30. We disagree. As with the Department's first argument, this theory requires us to read into the FOIA a disclosure exemption that Congress did not itself provide. This we decline to do. That Congress knew that other statutes created overlapping disclosure requirements is evident from § 552(b)(3), which authorizes an agency to refuse a FOIA request when the materials sought are expressly exempted from disclosure by another statute. If Congress had intended to enact the converse proposition—that an agency may refuse to provide disclosure of materials whose disclosure is *mandated* by another statute—it was free to do so. Congress, however, did not take such a step.[14]

The Department's last argument is derived from *GTE Sylvania*, where we held that agency records sought from the Consumer Products Safety Commission were not "improperly" withheld even though the records did not fall within one of subsection (b)'s enumerated exemptions. The Commission had not released the records in question because a district court, in the course of an unrelated lawsuit, had enjoined the Commission from doing so. In these circumstances, we held, "[t]he concerns underlying the Freedom of Information Act [were] inapplicable, for the agency . . . made no effort to avoid disclosure." 445 U. S., at 386. We therefore approved the Commission's compliance with the injunction, noting that when Congress passed the FOIA, it had not "intended to require an agency to commit contempt of court in order to release documents. Indeed, Congress viewed the federal courts as the necessary protectors of the public's right to know." *Id.*, at 387.

[14] It is unclear, moreover, whether 28 U. S. C. § 1914 permits a private cause of action to compel disclosure of a court decision.

Although the Department is correct in asserting that *GTE Sylvania* represents a departure from the FOIA's self-contained exemption scheme, this departure was a slight one at best, and was necessary in order to serve a critical goal independent of the FOIA—the enforcement of a court order. As we emphasized, *GTE Sylvania* arose in "a distinctly different context" than the typical FOIA case, *id.*, at 386, where the agency decides for itself whether to comply with a request for agency records. In such a case, the agency cannot contend that it has "no discretion . . . to exercise." *Ibid.*

The present dispute is clearly akin to those typical FOIA cases. No claim has been made that the Department was powerless to comply with Tax Analysts' requests. On the contrary, it was the Department's decision, and the Department's decision alone, not to make the court decisions available. We reject the Department's suggestion that *GTE Sylvania* invites courts in every case to engage in balancing, based on public availability and other factors, to determine whether there has been an unjustified denial of information. The FOIA invests courts neither with the authority nor the tools to make such determinations.

III

For the reasons stated, the Department improperly withheld agency records when it refused Tax Analysts' requests for copies of the district court tax decisions in its files.[15] Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE WHITE concurs in the judgment.

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[15] On appeal, Tax Analysts limited its requests to the approximately 25% of the district court decisions that it was unable to procure from court clerks or other sources. See 269 U. S. App. D. C., at 318, n. 5, 845 F. 2d, at 1063, n. 5; Brief for Respondent 8, n. 7. The Court of Appeals' remand thus was limited to these decisions, as is our affirmance. However, the reasoning we have employed applies equally to all of the district court decisions initially sought by Tax Analysts.

JUSTICE BLACKMUN, dissenting.

The Court in this case has examined once again the Freedom of Information Act (FOIA), 5 U. S. C. §552. It now determines that under the Act the Department of Justice on request must make available copies of federal district court orders and opinions it receives in the course of its litigation of tax cases on behalf of the Federal Government. The majority holds that these qualify as agency records, within the meaning of §552(a)(4)(B), and that they were improperly withheld by the Department when respondent asked for their production. The Court's analysis, I suppose, could be regarded as a fairly routine one.

I do not join the Court's opinion, however, because it seems to me that the language of the statute is not that clear or conclusive on the issue and, more important, because the result the Court reaches cannot be one that was within the intent of Congress when the FOIA was enacted.

Respondent Tax Analysts, although apparently a nonprofit organization for federal income tax purposes, is in business and in that sense is a commercial enterprise. It sells summaries of these opinions and supplies full texts to major electronic data bases. The result of its now-successful effort in this litigation is to impose the cost of obtaining the court orders and opinions upon the Government and thus upon taxpayers generally. There is no question that this material is available elsewhere. But it is quicker and more convenient, and less "frustrat[ing]," see *ante*, at 140, for respondent to have the Department do the work and search its files and produce the items than it is to apply to the respective court clerks.

This, I feel, is almost a gross misuse of the FOIA. What respondent demands, and what the Court permits, adds nothing whatsoever to public knowledge of Government operations. That, I had thought, and the majority acknowledges, see *ante*, at 142, was the real purpose of the FOIA and the

spirit in which the statute has been interpreted thus far. See, *e. g.*, *Forsham* v. *Harris*, 445 U. S. 169, 178 (1980); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 242–243 (1978). I also sense, I believe not unwarrantedly, a distinct lack of enthusiasm on the part of the majority for the result it reaches in this case.

If, as I surmise, the Court's decision today is outside the intent of Congress in enacting the statute, Congress perhaps will rectify the decision forthwith and will give everyone concerned needed guidelines for the administration and interpretation of this somewhat opaque statute.

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO *v.* BETTS

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88–389. Argued March 28, 1989—Decided June 23, 1989

The Public Employees Retirement System of Ohio (PERS), established by statute in 1933, provides retirement benefits for state and local government employees. Benefits are payable based on age and service or, for persons under the age of 60 at retirement, on disability. The disability retirees' age requirement has remained unchanged since 1959. However, in 1976, PERS was amended to provide that disability payments could not constitute less than 30% of the retiree's final average salary. No corresponding floor applies to age-and-service payments. Individuals continue to receive the type of benefit they retired on throughout retirement, regardless of age. In 1985, appellee, who had been employed by a county agency since 1978, retired at age 61 because of her health. Despite her medical condition, she was ineligible for disability retirement benefits because of her age. Her monthly age-and-service benefits amount to approximately one-half of the amount she would have received on disability retirement. She filed a charge against PERS with the Equal Employment Opportunity Commission (EEOC), and then filed suit in the District Court, claiming that PERS' refusal to grant her disability benefits application violated the Age Discrimination in Employment Act of 1967 (ADEA). The court granted summary judgment in her favor, finding that PERS' retirement scheme was discriminatory on its face in that it denied benefits to certain employees on account of age. It rejected PERS' reliance on § 4(f)(2) of the ADEA, which exempts from the Act's prohibitions certain actions taken in observance of "the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the Act]." Rather, the court, relying on the EEOC's interpretive regulations, held that plans qualify for the § 4(f)(2) exemption only if age-related reductions in benefits are justified by the increased cost of providing those benefits to older employees, which was not the case here. The Court of Appeals affirmed, agreeing that the exemption is available only to plans that can provide such cost justifications or establish a substantial business purpose. The court rejected PERS' reliance on *United Air Lines, Inc.* v. *McMann*, 434 U. S. 192, which, in upholding an age-based mandatory retirement plan, ruled that plans

adopted prior to the ADEA's enactment need not be justified by any business purpose, and defined "subterfuge" to mean "a scheme, plan, strategem, or artifice of evasion." Instead, the court concluded that Congress had expressly repudiated *McMann* when it amended the ADEA in 1978 by adding a clause forbidding age-based mandatory retirement to the end of § 4(f)(2).

Held: Section 4(f)(2) exempts all provisions of bona fide employee benefit plans from the purview of the ADEA, unless the plan is a subterfuge for discrimination in the non-fringe-benefit aspects of the employment relationship, and summary judgment for appellee was therefore inappropriate. Pp. 165–182.

(a) An employee benefit plan adopted prior to the ADEA's enactment cannot be a subterfuge. While the 1978 amendment to the ADEA changed the specific result in *McMann*, it did not change the controlling, general language of the statute. Since Congress did not add a definition of "subterfuge" or modify § 4(f)(2)'s language in any way other than by adding the new last phrase, there is no reason to depart from *McMann*'s holding that "subterfuge" should be given its ordinary meaning. However, this reaffirmation of *McMann* does not insulate the specific plan provision being attacked—the 30% floor—from challenge, since it was not added to the plan until 1976, after the ADEA became applicable to PERS. Pp. 165–169.

(b) Section 4(f)(2) does not protect age-based distinctions in employee benefit plans only when justified by the increased costs of benefits for older workers. Thus, 29 CFR § 1625.10, which recites such a definition, is invalid. No such requirement can be found in the statute itself. Moreover, § 1625.10's definition is not entitled to deference since the term "subterfuge," as interpreted in *McMann*, includes a subjective intent element which § 1625.10's objective requirement fails to acknowledge; since the regulation, contrary to the EEOC's suggestion, was not adopted contemporaneously with the ADEA's enactment; and since appellee's reliance on the ADEA's legislative history and the 1978 amendment is misplaced. The cost-justification rule also is not supported by the argument that the statutory phrase that "any bona fide employee benefit plan such as a retirement, pension, or insurance plan" is intended to limit § 4(f)(2)'s protection to those plans which have a cost justification for all age-based differentials in benefits. The statutory language on its face appears to be nothing more than a listing of the general types of plans that fall within the "employee benefit plan" category rather than an exclusive listing. Nor is it apparent that the specified plans were intentionally selected because the costs to employers of the benefits provided by these plans tend to increase with age. In addition, the regula-

tory definition of an employee benefit plan does not support the proffered interpretation. Pp. 169–175.

(c) Both the statute and the legislative history support a construction of § 4(f)(2) that exempts the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship. Thus, a post-Act plan cannot be a subterfuge to evade the ADEA's purpose of banning arbitrary age discrimination unless it discriminates in a manner forbidden by the Act's substantive provisions. If the ADEA's substantive prohibitions were read to encompass employee benefit plans, any employee benefit plan that by its terms mandated the discrimination allowed under § 4(f)(2) would be facially irreconcilable with the purposes of the Act, a result Congress could not have intended. Pp. 175–180.

(d) An employee seeking to challenge an employee benefit plan provision as a subterfuge bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relationship. Section 4(f)(2) redefines the elements of the plaintiff's prima facie case, since it is not so much a defense to an age discrimination charge as it is a description of the type of employer conduct that is prohibited in the employee benefit plan context. This interpretation is consistent with this Court's longstanding interpretation of the analogous provision of Title VII of the Civil Rights Act of 1964. Summary judgment for appellee was inappropriate because she failed to meet her burden of proof on this issue. On remand, the District Court should give appellee an opportunity to demonstrate the existence of a genuine issue of material fact. Pp. 181–182.

848 F. 2d 692, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 182.

Andrew I. Sutter, Assistant Attorney General of Ohio, argued the cause for appellant. With him on the briefs were *Anthony J. Celebrezze, Jr.*, Attorney General, and *Nancy J. Miller*.

Robert F. Laufman argued the cause for appellee. With him on the brief was *Alphonse A. Gerhardstein*.

Christopher J. Wright argued the cause for the Equal Employment Opportunity Commission as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Bryson, Deputy Solicitor General Merrill, Charles A. Shanor, Gwendolyn Young Reams,* and *Harry F. Tepker, Jr.**

JUSTICE KENNEDY delivered the opinion of the Court.

The Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.* (1982 ed. and Supp. V), forbids arbitrary discrimination by public and private employers against employees on account of age. Under § 4(f)(2) of the Act, 29 U. S. C. § 623(f)(2), however, age-based employment decisions taken pursuant to the terms of "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the Act, are exempt from the prohibitions of the ADEA. In the case before us, we must consider the meaning and scope of the § 4(f)(2) exemption.

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*Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Pennsylvania et al. by *LeRoy S. Zimmerman,* Attorney General of Pennsylvania, *Susan J. Forney,* Senior Deputy Attorney General, and *John G. Knorr III,* Chief Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Grace Berg Schaible* of Alaska, *Joseph I. Lieberman* of Connecticut, *Warren Price III* of Hawaii, *Cary Edwards* of New Jersey, *Kenneth O. Eikenberry* of Washington, and *Charles G. Brown* of West Virginia; for the Association of Private Pension and Welfare Plans by *Paul J. Ondrasik, Jr.;* for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell,* and *Ann Elizabeth Reesman;* and for the National Public Employers Labor Relations Association by *Glen G. Nager* and *Andrew M. Kramer.*

Christopher G. Mackaronis and *Cathy Ventrell-Monsees* filed a brief for the American Association of Retired Persons as *amicus curiae* urging affirmance.

John K. Van de Kamp, Attorney General of California, *N. Eugene Hill,* Assistant Attorney General, *Henry G. Ullerich,* Supervising Deputy Attorney General, and *Silvia M. Diaz,* Deputy Attorney General, filed a brief for the California State Teachers' Retirement System as *amicus curiae.*

I

A

In 1933, the State of Ohio established the Public Employees Retirement System of Ohio (PERS) to provide retirement benefits for state and local government employees. Public employers and employees covered by PERS make contributions to a fund maintained by PERS to pay benefits to covered employees. Under the PERS statutory scheme, two forms of monthly retirement benefits are available to public employees upon termination of their public employment. Age-and-service retirement benefits are paid to those employees who at the time of their retirement (1) have at least 5 years of service credit and are at least 60 years of age; (2) have 30 years of service credit; or (3) have 25 years of service credit and are at least 55 years of age. Ohio Rev. Code Ann. §§ 145.33, 145.34 (1984 and Supp. 1988). Disability retirement benefits are available to employees who suffer a permanent disability, have at least five years of total service credit, and are under the age of 60 at retirement. § 145.35. The requirement that disability retirees be under age 60 at the time of their retirement was included in the original PERS statute, and has remained unchanged since 1959.

Employees who take disability retirement are treated as if they are on leave of absence for the first five years of their retirement. Should their medical conditions improve during that time, they are entitled to be rehired. § 145.39. Employees receiving age-and-service retirement, on the other hand, are not placed on leave of absence, but they are permitted to apply for full-time employment with any public employer covered by PERS after 18 months of retirement. Ohio Rev. Code Ann. § 145.381(C) (1984). Once an individual retires on either age-and-service or disability retirement benefits, he or she continues to receive that type of benefit throughout retirement, regardless of age.

B

Appellee June M. Betts was hired by the Hamilton County Board of Mental Retardation and Developmental Disabilities as a speech pathologist in 1978. The board is a public agency, and its employees are covered by PERS. In 1984, because of medical problems, appellee became unable to perform her job adequately and was reassigned to a less demanding position. Appellee's medical condition continued to deteriorate, however, and by May 1985, when appellee was 61 years of age, her employer concluded that she was no longer able to perform adequately in any employment capacity. Appellee was given the choice of retiring or undergoing medical testing to determine whether she should be placed on unpaid medical leave. She chose to retire, an option which gave her eligibility for age-and-service retirement benefits from PERS. Because she was over 60 at the time of retirement, however, appellee was denied disability retirement benefits, despite her medical condition.

Before 1976, the fact that appellee's age disqualified her for disability benefits would have had little practical significance, because the formula for calculating disability benefits was almost the same as the formula used to determine age-and-service benefits. In 1976, however, the PERS statutory scheme was amended to provide that disability retirement payments would in no event constitute less than 30 percent of the disability retiree's final average salary. Ohio Rev. Code Ann. § 145.36 (1984). No such floor applies in the case of employees receiving age-and-service retirement payments. The difference was of much significance in appellee's case: her age-and-service retirement benefits amount to $158.50 per month, but she would have received nearly twice that, some $355 per month, had she been permitted to take disability retirement instead.

Appellee filed an age discrimination charge against PERS with the Equal Employment Opportunity Commission

(EEOC), and filed suit in the United States District Court for the Southern District of Ohio, claiming that PERS' refusal to grant her application for disability retirement benefits violated the ADEA. The District Court found that PERS' retirement scheme was discriminatory on its face, in that it denied disability retirement benefits to certain employees on account of their age. *Betts* v. *Hamilton County Bd. of Mental Retardation*, 631 F. Supp. 1198, 1202–1203 (1986). The court rejected PERS' reliance on § 4(f)(2) of the ADEA, which exempts from the Act's prohibitions certain actions taken in observance of "the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the Act] . . . ." 29 U. S. C. § 623(f)(2). Relying on interpretive regulations promulgated by the EEOC, the District Court held that employee benefit plans qualify for the § 4(f)(2) exemption only if any age-related reductions in employee benefits are justified by the increased cost of providing those benefits to older employees. Because the PERS plan provided for a reduction in available benefits at age 60, a reduction not shown to be justified by considerations of increased cost, the court concluded that PERS' plan was not entitled to claim the protection of the § 4(f)(2) exemption. 631 F. Supp., at 1203–1204.[1]

A divided panel of the Court of Appeals affirmed. *Betts* v. *Hamilton County Bd. of Mental Retardation and Developmental Disabilities*, 848 F. 2d 692 (CA6 1988). The majority agreed with the District Court that the § 4(f)(2) exemption is available only to those retirement plans that can provide age-related cost justifications or "a substantial business purpose" for any age-based reduction in benefits. *Id.*, at 694. The

[1] The District Court also found that PERS' disability retirement plan was not covered by § 4(f)(2) because PERS' actions were not taken pursuant to the terms of the plan, and because the plan impermissibly permits or requires involuntary retirement on the basis of age. 631 F. Supp., at 1204–1205.

majority rejected PERS' reliance on *United Air Lines, Inc.* v. *McMann*, 434 U. S. 192 (1977), which held that retirement plans adopted prior to the enactment of the ADEA need not be justified by any business purpose, concluding that Congress had "expressly repudiated" this decision when it amended the ADEA in 1978. 848 F. 2d, at 694. Because PERS had failed to provide any evidence that its discrimination against older workers was justified by age-related cost considerations, the majority concluded that summary judgment was appropriate.

Judge Wellford dissented. Noting that PERS' plan was adopted long before enactment of the ADEA, he argued that under *United Air Lines, Inc.* v. *McMann*, *supra*, it could not be a "subterfuge to evade the purposes" of the Act. Judge Wellford rejected the EEOC's regulations requiring cost justifications for all age-based reductions in benefits, finding that nothing in the statute's language imposed such a requirement. We noted probable jurisdiction, 488 U. S. 907 (1988), and now reverse.

II

Under § 4(a)(1) of the ADEA, it is unlawful for an employer

> "to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U. S. C. § 623(a)(1).

Notwithstanding this general prohibition, however, § 4(f)(2) of the ADEA provides that it is *not* unlawful for an employer

> "to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such . . . employee benefit plan shall require or permit

> the involuntary retirement of any individual . . . because of the age of such individual." 29 U. S. C. § 623(f)(2).

On its face, the PERS statutory scheme renders covered employees ineligible for disability retirement once they have attained age 60. Ohio Rev. Code Ann. § 145.35 (1984). PERS' refusal to grant appellee's application for disability benefits therefore qualifies as an action "to observe the terms of" the plan. All parties apparently concede, moreover, that PERS' plan is "bona fide," in that it "'exists and pays benefits.'" *McMann*, 434 U. S., at 194; see *id.*, at 206–207 (WHITE, J., concurring in judgment). Finally, whatever the precise meaning of the phrase "any . . . employee benefit plan such as a retirement, pension, or insurance plan," see *infra*, at 173–175, it is apparent that a disability retirement plan falls squarely within that category. Cf. 29 CFR § 1625.10(f)(1)(ii) (1988). Accordingly, PERS is entitled to the protection of the § 4(f)(2) exemption unless its plan is "a subterfuge to evade the purposes of" the Act.[2]

We first construed the meaning of "subterfuge" under § 4(f)(2) in *United Air Lines, Inc.* v. *McMann*, *supra*. In *McMann*, the employer's retirement plan required employees to retire at the age of 60. After being forced to retire by the terms of the plan, McMann sued under the ADEA, claiming that the forced retirement was a violation of the Act, and that the mandatory retirement provision was not protected by the § 4(f)(2) exemption because it was a subterfuge to evade the purposes of the Act.[3] We rejected both positions.

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[2] As a result of the 1978 amendments, § 4(f)(2) cannot be used to justify forced retirement on account of age. Appellee contends, and the District Court found, that appellee was forced to retire under the terms of PERS' plan, and that as a result § 4(f)(2) is unavailable to PERS. The Court of Appeals did not address this question, and we express no opinion on it, leaving its resolution to that court on remand.

[3] When *McMann* was decided, § 4(f)(2) did not contain the final clause excluding from its protection benefit plans that "require or permit the involuntary retirement of any individual . . . because of the age of such individual."

With respect to mandatory retirement, we found that the statutory language and legislative history provided no support for the proposition that Congress intended to forbid age-based mandatory retirement.

Turning to the claim that the mandatory retirement provision was a "subterfuge to evade the purposes of" the Act, we rejected the conclusion of the court below that forced retirement on the basis of age must be deemed a subterfuge absent some business or economic purpose for the age-based distinction. Instead, we held that the term "subterfuge" must be given its ordinary meaning as "a scheme, plan, stratagem, or artifice of evasion." *Id.*, at 203. Viewed in this light, the retirement plan at issue could not possibly be characterized as a subterfuge to evade the purposes of the Act, since it had been established in 1941, long before the Act was enacted. As we observed, "[t]o spell out an intent in 1941 to evade a statutory requirement not enacted until 1967 attributes, at the very least, a remarkable prescience to the employer. We reject any such *per se* rule requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act." *Ibid.*

As an initial matter, appellee asserts that *McMann* is no longer good law. She points out that in 1978, less than a year after *McMann* was decided, Congress amended § 4(f)(2) to overrule *McMann*'s validation of mandatory retirement based on age. See Pub. L. 95–256, § 2(a), 92 Stat. 189. The result of that amendment was the addition of what now is the final clause of § 4(f)(2).

The legislative history of the 1978 amendment contains various references to the definition of subterfuge, and according to appellee these reveal clear congressional intent to disapprove the reasoning of *McMann*. The Conference Committee Report on the 1978 amendment, for example, expressly discusses and rejects *McMann*, stating that "[p]lan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they

antedate the act or these amendments." H. R. Conf. Rep. No. 95–950, p. 8 (1978). See also 124 Cong. Rec. 7881 (1978) (remarks of Rep. Hawkins) ("The conferees specifically disagree with the Supreme Court's holding and reasoning in *[McMann]*, particularly its conclusion that an employee benefit plan which discriminates on the basis of age is protected by section 4(f)(2) because it predates the enactment of the ADEA"); *id.*, at 8219 (remarks of Sen. Javits); *id.*, at 7888 (remarks of Rep. Waxman).

PERS disputes appellee's interpretation of this legislative history, asserting that it refers only to benefit plans that permit involuntary retirement and not to the more general issue whether a pre-Act plan can be a subterfuge in other circumstances. We need not resolve this dispute, however. The 1978 amendment to the ADEA did not add a definition of the term "subterfuge" or modify the language of § 4(f)(2) in any way, other than by inserting the final clause forbidding mandatory retirement based on age. We have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute. See *Weinberger* v. *Rossi*, 456 U. S. 25, 35 (1982); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 118, and n. 13 (1980); *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 170 (1968); *Rainwater* v. *United States*, 356 U. S. 590, 593 (1958); see also *McMann*, *supra*, at 200, n. 7. Congress changed the specific result of *McMann* by adding a final clause to § 4(f)(2), but it did not change the controlling, general language of the statute. As Congress did not amend the relevant statutory language, we see no reason to depart from our holding in *McMann* that the term "subterfuge" is to be given its ordinary meaning, and that as a result an employee benefit plan adopted prior to enactment of the ADEA cannot be a subterfuge. See *EEOC* v. *Cargill, Inc.*, 855 F. 2d 682, 686 (CA10 1988); *EEOC* v. *County of Orange*, 837 F. 2d 420, 422 (CA9 1988).

According to PERS, our reaffirmation of *McMann* should resolve this case. The PERS system was established by statute in 1933, and the rule that employees over age 60 may not qualify for disability retirement benefits has remained unchanged since 1959. The ADEA was not made applicable to the States until 1974. See Pub. L. 93–259, § 28(a)(2), 88 Stat. 74, codified at 29 U. S. C. § 630(b)(2). Since the age-60 requirement predates application of the ADEA to PERS, PERS argues that, under *McMann*, its plan cannot be a subterfuge to evade the purposes of the ADEA.

While *McMann* remains of considerable relevance to our decision here, we reject the argument that it is dispositive. It is true that the age-60 rule was adopted before 1974, and is thus insulated under *McMann* from challenge as a subterfuge. The plan provision attacked by appellee, however, is the rule that disability retirees automatically receive a minimum of 30 percent of their final average salary upon retirement, while disabled employees who retire after age 60 do not. The 30 percent floor was not added to the plan until 1976, and to the extent this new rule increased the age-based disparity caused by the pre-Act age limitation, *McMann* does not insulate it from challenge. See *EEOC* v. *Cargill*, *supra*, at 686, n. 4; *EEOC* v. *County of Orange*, *supra*, at 423; *EEOC* v. *Home Ins. Co.*, 672 F. 2d 252, 259, and n. 9 (CA2 1982). No "remarkable prescience" would have been required of PERS in 1976 for it to formulate the necessary intent to evade the ADEA, and thus the automatic rule of *McMann* is inapplicable. See 434 U. S., at 203. Accordingly, we must turn to an inquiry into the precise meaning of the § 4(f)(2) exemption in the context of post-Act plans.

III

Appellee and her *amici* say that § 4(f)(2) protects age-based distinctions in employee benefit plans only when justified by the increased cost of benefits for older workers. They cite an interpretive regulation promulgated by the De-

partment of Labor, the agency initially charged with enforcing the Act, in 1979. 44 Fed. Reg. 30658–30662 (1979), codified at 29 CFR § 860.120 (1980), redesignated 29 CFR § 1625.10 (1988). The regulation recites that the purpose of the exemption "is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations," and that "benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers." § 1625.10(a)(1). With respect to disability benefits in particular, the regulation provides that "[r]eductions on the basis of age in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations . . . ." § 1625.10(f)(1)(ii). Under these provisions, employers may reduce the value of the benefits provided to older workers as necessary to equalize costs for workers of all ages, but they cannot exclude older workers from the coverage of their benefit plans altogether.

The requirement that employers show a cost-based justification for age-related reductions in benefits appears nowhere in the statute itself. The EEOC as *amicus* contends that this rule can be drawn either from the statutory requirement that age-based distinctions in benefit plans not be a subterfuge to evade the purposes of the Act, or from the portion of § 4(f)(2) limiting its scope to actions taken pursuant to "any bona fide employee benefit plan such as a retirement, pension, or insurance plan." Brief for EEOC as *Amicus Curiae* 9–14. We consider these alternatives in turn.

A

The regulations define "subterfuge" as follows: "In general, a plan or plan provision which prescribes lower benefits for older employees on account of age is not a 'subterfuge' within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations." 29 CFR § 1625.10(d) (1988). Various lower courts

have accepted this definition. *E. g.*, *EEOC* v. *Mt. Lebanon*, 842 F. 2d 1480, 1489 (CA3 1988); see also *Cipriano* v. *Board of Education of North Tonawanda School Dist.*, 785 F. 2d 51, 57–58 (CA2 1986). As the analysis in *McMann* makes apparent, however, this approach to the definition of subterfuge cannot be squared with the plain language of the statute. Although *McMann*'s holding, that pre-Act plans can never be a subterfuge, is not dispositive here, its reasoning is nonetheless controlling, for we stated in that case that "subterfuge" means "a scheme, plan, stratagem, or artifice of evasion," which, in the context of §4(f)(2), connotes a specific "intent . . . to evade a statutory requirement." 434 U. S., at 203. The term thus includes a subjective element that the regulation's objective cost-justification requirement fails to acknowledge.

Ignoring this inconsistency with the plain language of the statute, appellee and the EEOC suggest that the regulation represents a contemporaneous and consistent interpretation of the ADEA by the agencies responsible for the Act's enforcement and is therefore entitled to special deference. See *EEOC* v. *Associated Dry Goods Corp.*, 449 U. S. 590, 600, n. 17 (1981); see also *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). But, of course, no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.

Contrary to the suggestion of the EEOC and appellee, moreover, the cost-justification requirement was not adopted contemporaneously with enactment of the ADEA. The cost-justification rule had its genesis in an interpretive bulletin issued by the Department of Labor in January 1969. 34 Fed. Reg. 322, 323, codified at 29 CFR §860.120(a) (1970). To be sure, that regulation provided that plans which reduced benefits on the basis of age would "be considered in compliance with the statute" if the benefit reductions were justified

by age-related cost considerations, but it did not purport to exclude from the § 4(f)(2) exemption all plans that could not meet a cost-justification requirement.[4] Rather, this original version of the cost-justification rule was nothing more than a safe harbor, a nonexclusive objective test for employers to use in determining whether they could be certain of qualifying for the § 4(f)(2) exemption. It was not until 1979 that this regulatory safe harbor was transformed into the exclusive means of escaping classification as a subterfuge.

Appellee and her *amici* rely in large part on the legislative history of the ADEA and the 1978 amendments. In view of our interpretation of the plain statutory language of the subterfuge requirement, however, this reliance on legislative history is misplaced. See *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 808, n. 3 (1989); *McMann*, 434 U. S., at 199. The "subterfuge" exception to the § 4(f)(2) exemption cannot be limited in the manner suggested by the regulation.

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[4] As originally promulgated in January 1969, the regulation provided:

"Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization 'to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual . . . .' Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purposes of the Act. A retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage." 29 CFR § 860.120(a) (1970).

B

The second possible source of authority for the cost-justification rule is the statute's requirement that the § 4(f)(2) exemption be available only in the case of "any bona fide employee benefit plan such as a retirement, pension, or insurance plan." The EEOC argues, and some courts have held, that the phrase "such as a retirement, pension, or insurance plan" is intended to limit the protection of § 4(f)(2) to those plans which have a cost justification for all age-based differentials in benefits. See *EEOC* v. *Westinghouse Electric Corp.*, 725 F. 2d 211, 224 (CA3 1983), cert. denied, 469 U. S. 820 (1984); *EEOC* v. *Borden's, Inc.*, 724 F. 2d 1390, 1396 (CA9 1984). The argument is as follows: the types of plans listed in the statute share the common characteristic that the cost of the benefits they provide generally rises with the age of their beneficiaries. This common characteristic suggests that Congress intended the § 4(f)(2) exemption to cover only those plans in which costs rise with age. The obvious explanation for the limitation on the scope of § 4(f)(2), the argument continues, is that the purpose of the exemption is to permit employers to reduce overall benefits paid to older workers only to the extent necessary to equalize costs for older and younger workers.

There are a number of difficulties with this explanation for the cost-justification requirement. Perhaps most obvious, it requires us to read a great deal into the language of this clause of § 4(f)(2), language that appears on its face to be nothing more than a listing of the general types of plans that fall within the category of "employee benefit plan." The statute's use of the phrase "*any* employee benefit plan" seems to imply a broad scope for the statutory exemption, and the "such as" clause suggests enumeration by way of example, not an exclusive listing. Nor is it by any means ap-

parent that the types of plans mentioned were intentionally selected because the cost to the employer of the benefits provided by these plans tends to increase with age. Indeed, many plans that fall within these categories do not share that particular attribute at all, defined-contribution pension plans perhaps being the most obvious example.[5] We find it quite difficult to believe that Congress would have chosen such a circuitous route to the result urged by appellee and the EEOC.

The interpretation is weakened further by the fact that the regulation itself does not support it. According to 29 CFR § 1625.10(b) (1988), "[a]n 'employee benefit plan' is a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as 'fringe benefits.'" This definition makes no mention of the limitation urged by the EEOC, and indeed seems sufficiently broad to encompass a wide variety of plans providing fringe benefits to employees, regardless of whether the cost of those benefits increases with age. The regulation's discussion of the cost-justification requirement is reserved for the subsection defining "subterfuge." § 1625.10(d).[6] Under these

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[5] A defined contribution plan is one in which "the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide." *Alabama Power Co.* v. *Davis*, 431 U. S. 581, 593, n. 18 (1977); see 29 U. S. C. § 1002(34). Under this type of plan, the cost of making contributions for any given employee is completely unrelated to that employee's age. The dissent therefore is quite wrong to suggest that these plans "commonly—indeed, almost invariably—entail costs that rise with the age of the beneficiary. . . ." *Post*, at 187.

[6] Regulations issued by the Department of Labor in 1969 did provide that "[n]ot all employee benefit plans but only those similar to the kind enumerated in section 4(f)(2) of the Act come within this provision." 34 Fed. Reg. 9708, 9709 (1969), codified at 29 CFR § 860.120(b) (1970). Accordingly, the regulations suggested that "a profit-sharing plan as such would not appear to be within [the] terms" of § 4(f)(2). *Ibid.* According to the EEOC, this provision reflects the Department's conclusion that § 4(f)(2) "would not shield discrimination against older employees in the provision of

circumstances, this aspect of the EEOC's argument is entitled to little, if any, deference. Cf. *Bowen* v. *Georgetown University Hospital*, 488 U. S. 204, 212–213 (1988).

For these reasons, we conclude that the phrase "any bona fide employee benefit plan such as a retirement, pension, or insurance plan" cannot reasonably be limited to benefit plans in which all age-based reductions in benefits are justified by age-related cost considerations. Accordingly, the interpretive regulation construing § 4(f)(2) to include a cost-justification requirement is contrary to the plain language of the statute and is invalid.

IV

Having established that the EEOC's definition of subterfuge is invalid, we turn to the somewhat more difficult task of determining the precise meaning of the term as applied to post-Act plans. We begin, as always, with the language of the statute itself.

The protection of § 4(f)(2) is unavailable to any employee benefit plan "which is a subterfuge to evade the purposes of" the Act. As set forth in § 2(b) of the ADEA, the purposes of

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profit-sharing benefits because the cost of providing those benefits does not increase as employees age." Brief for EEOC as *Amicus Curiae* 10–11 n. 4. Nothing in the regulation suggested, however, that the reason for the exclusion of profit-sharing plans was that such plans were not characterized by increasing costs with age. To the contrary, it seems clear that the Department of Labor viewed the § 4(f)(2) exemption as applicable to plans that served the purpose of retirement, pension, or insurance plans, regardless of whether the cost of the benefits provided by such plans rose with the age of their beneficiaries:

"However, where it is the essential purpose of a plan financed from profits to provide retirement benefits for employees, the exception may apply. The 'bona fides' of such plans will be considered on the basis of all the particular facts and circumstances." 29 CFR § 860.120(b) (1970).

We express no opinion, of course, on the precise meaning of the phrase "any bona fide employee benefit plan such as a retirement, pension, or insurance plan." We hold only that it does not support the cost-justification requirement urged by appellee and the EEOC.

the Act are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U. S. C. § 621(b). On the facts of this case, the only purpose that the PERS plan could be a "subterfuge to evade" is the goal of eliminating "arbitrary age discrimination in employment."

As the presence of the various exemptions and affirmative defenses contained in § 4(f) illustrates, Congress recognized that not all age discrimination in employment is "arbitrary." In order to determine the type of age discrimination that Congress sought to eliminate as arbitrary, we must look for guidance to the substantive prohibitions of the Act itself, for these provide the best evidence of the nature of the evils Congress sought to eradicate. Indeed, our decision in *McMann* compels this approach, for it rejected the contention that the purposes of the Act can be distinguished from the Act itself: "The distinction relied on is untenable because the Act is the vehicle by which its purposes are expressed and carried out; it is difficult to conceive of a subterfuge to evade the one which does not also evade the other." 434 U. S., at 198. Accordingly, a post-Act plan cannot be a subterfuge to evade the ADEA's purpose of banning arbitrary age discrimination unless it discriminates in a manner forbidden by the substantive provisions of the Act.

Section 4(a), the ADEA's primary enforcement mechanism against age discrimination by employers, forbids employers

> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise ad-

versely affect his status as an employee, because of such individual's age; or

"(3) to reduce the wage rate of any employee in order to comply with this chapter." 29 U. S. C. § 623(a).

The phrase "compensation, terms, conditions, or privileges of employment" in § 4(a)(1) can be read to encompass employee benefit plans of the type covered by § 4(f)(2). Such an interpretation, however, would in effect render the § 4(f)(2) exemption nugatory with respect to post-Act plans. Any benefit plan that by its terms mandated discrimination against older workers would also be facially irreconcilable with the prohibitions in § 4(a)(1) and, therefore, with the purposes of the Act itself. It is difficult to see how a plan provision that expressly mandates disparate treatment of older workers in a manner inconsistent with the purposes of the Act could be said not to be a subterfuge to evade those purposes, at least where the plan provision was adopted after enactment of the ADEA.

On the other hand, if § 4(f)(2) is viewed as exempting the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship, both statutory provisions can be given effect. This interpretation of the ADEA would reflect a congressional judgment that age-based restrictions in the employee benefit plans covered by § 4(f)(2) do not constitute the "arbitrary age discrimination in employment" that Congress sought to prohibit in enacting the ADEA. Instead, under this construction of the statute, Congress left the employee benefit battle for another day, and legislated only as to hiring and firing, wages and salaries, and other non-fringe-benefit terms and conditions of employment.

To be sure, this construction of the words of the statute is not the only plausible one. But the alternative interpretation would eviscerate § 4(f)(2). As JUSTICE WHITE wrote in his separate concurrence in *McMann*, "[b]ecause all retire-

ment plans necessarily make distinctions based on age, I fail to see how the subterfuge language, which was included in the original version of the bill and was carried all the way through, could have been intended to impose a requirement which almost no retirement plan could meet." 434 U. S., at 207.

Not surprisingly, the legislative history does not support such a self-defeating interpretation, but to the contrary shows that Congress envisioned a far broader role for the § 4(f)(2) exemption. When S. 830, the bill that was to become the ADEA, was originally proposed by the administration in January 1967, it contained no general exemption for benefit plans that differentiated in benefits based on age.[7] Senator Javits, one of the principal moving forces behind enactment of age discrimination legislation, generally favored the administration's bill, but believed that a broader exemption for employee benefit plans was needed. Accordingly, he proposed an amendment substantially along the lines of present-day § 4(f)(2). 113 Cong. Rec. 7077 (1967).

One factor motivating Senator Javits' amendment was the concern that, absent some exemption for benefit plans, the Act might "actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when they might have done so under a law granting them a degree of flexibility with respect to such matters." *Id.*, at 7076.[8] Reducing the cost of

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[7] The administration bill's version of § 4(f)(2) provided that "[i]t shall not be unlawful for an employer, employment agency, or labor organization . . . to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act." 113 Cong. Rec. 2794 (1967).

[8] Elsewhere, Senator Javits explained that under his version of § 4(f)(2) "an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers." *Id.*, at 31254–31255.

hiring older workers was not the only purpose of the proposed amendment, however. Its goals were far more comprehensive. As Senator Javits put it, "the age discrimination law is not the proper place to fight" the battle of ensuring "adequate pension benefits for older workers," and § 4(f)(2) was therefore intended to be "a fairly broad exemption . . . for bona fide retirement and seniority systems." *Ibid.* Later, referring to the effect of his proposed amendment on the provisions of employee benefit plans, Senator Javits stated that "[i]f the older worker chooses to waive all of those provisions, then the older worker can obtain the benefits of this act . . . ." *Id.*, at 31255. And finally, in his individual views accompanying the Senate Report on S. 830, Senator Javits observed: "I believe the bill has also been improved by the adoption of language, based on an amendment which I had offered, *exempting the observance of bona fide seniority systems and retirement, pension, or other employment benefit plans from its prohibitions.*" S. Rep. No. 723, 90th Cong., 1st Sess., 14 (1967) (emphasis added).

Other Members of Congress expressed similar views. Senator Yarborough, the principal sponsor and floor manager of the administration bill, observed that § 4(f)(2), "when it refers to retirement, pension, or insurance plan, . . . means that a man who would not have been employed except for this law does not have to receive the benefits of the plan." 113 Cong. Rec. 31255 (1967). Indeed, at least one Congressman opposed the ADEA precisely because it permitted employers to exclude older employees from participation in benefit plans altogether when the terms of the plans mandated that result. *Id.*, at 34745 (remarks of Rep. Smith).

While the Committee Reports on the ADEA do not address the matter in any detail, they do state that § 4(f)(2) "serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans." S. Rep. No. 723, *supra*, at 4; H. R. Rep. No. 805, 90th

Cong., 1st Sess., 4 (1967). That explanation does not support a narrow reading of the § 4(f)(2) exemption. The Committee Reports, moreover, refute a reading of § 4(f)(2) that would limit its protection to pre-Act plans, for they make it clear that the exemption "applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans." S. Rep. No. 723, *supra*, at 4; H. R. Rep. No. 805, *supra*, at 4. In short, the legislative history confirms that the broader reading of § 4(f)(2) is the correct one, and that Congress intended to exempt employee benefit plans from the coverage of the Act except to the extent plans were used as a subterfuge for age discrimination in other aspects of the employment relation.

While this result permits employers wide latitude in structuring employee benefit plans, it does not render the "not a subterfuge" proviso a dead letter. Any attempt to avoid the prohibitions of the Act by cloaking forbidden discrimination in the guise of age-based differentials in benefits will fall outside the § 4(f)(2) exemption. Examples of possible violations of this kind can be given. Under § 4(d) of the ADEA, for example, it is unlawful for an employer to discriminate against an employee who has "opposed any action made unlawful by" the Act or has participated in the filing of any age-discrimination complaints or litigation. Nothing in § 4(f)(2) would insulate from liability an employer who adopted a plan provision formulated to retaliate against such an employee. See 29 CFR § 1625.10(d)(5) (1988). Similarly, while § 4(f)(2) generally protects age-based reductions in fringe benefits, an employer's decision to reduce salaries for all employees while substantially increasing benefits for younger workers might give rise to an inference that the employer was in fact utilizing its benefits plan as a subterfuge for age-based discrimination in wages, an activity forbidden by § 4(a)(1). These examples are not exhaustive, but suffice to illustrate the not-insignificant protections provided to older employees by the subterfuge proviso in the § 4(f)(2) exemption.

V

As construed above, § 4(f)(2) is not so much a defense to a charge of age discrimination as it is a description of the type of employer conduct that is prohibited in the employee benefit plan context. By requiring a showing of actual intent to discriminate in those aspects of the employment relationship protected by the provisions of the ADEA, § 4(f)(2) redefines the elements of a plaintiff's prima facie case instead of establishing a defense to what otherwise would be a violation of the Act. Thus, when an employee seeks to challenge a benefit plan provision as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation.

This result is supported by our longstanding interpretation of the analogous provision of Title VII, the statute from which "the prohibitions of the ADEA were derived *in haec verba*." *Lorillard* v. *Pons*, 434 U. S. 575, 584 (1978). Section 703(h) of Title VII states that

> "[n]otwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . ." 42 U. S. C. § 2000e–2(h).

Despite the fact that § 703(h), like § 4(f)(2), appears on first reading to describe an affirmative defense, we have "regarded [§ 703(h)] not as a defense . . . but as a provision that itself 'delineates which employment practices are illegal and thereby prohibited and which are not.'" *Lorance* v. *AT&T Technologies, Inc.*, 490 U. S. 900, 908 (1989) (quoting *Franks*

v. *Bowman Transportation Co.*, 424 U. S. 747, 758 (1976)). Although the use of the phrase "subterfuge to evade the purposes of [the Act]" in § 4(f)(2) renders the scope of its protection for employee benefit plans broader than the scope of the protection for seniority systems provided by § 703(h), the similar structure and purpose of the two provisions supports the conclusion that ADEA plaintiffs must bear the burden of showing subterfuge.

Applying this structure to the facts here, it follows that PERS' disability retirement plan is the type of plan subject to the § 4(f)(2) exemption, and PERS' refusal to grant appellee's request for disability benefits was required by the terms of the plan. Because appellee has failed to meet her burden of proving that the reduction in benefits at age 60 was the result of an intent to discriminate in some non-fringe-benefit aspect of the employment relation, summary judgment for appellee was inappropriate. On remand, the District Court should give appellee an opportunity to demonstrate the existence of a genuine issue of material fact on this issue. See *Celotex Corp.* v. *Catrett*, 477 U. S. 317 (1986). The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The majority today immunizes virtually all employee benefit programs from liability under the Age Discrimination in Employment Act of 1967 (ADEA or Act), 29 U. S. C. § 621 *et seq.* (1982 ed. and Supp. V). Henceforth, liability will not attach under the ADEA even if an employer is unable to put forth any justification for denying older workers the benefits younger ones receive, and indeed, even if his only reason for discriminating against older workers in benefits is his abject hostility to, or his unfounded stereotypes, of them. In reaching this surprising result, the majority casts aside the esti-

mable wisdom of all five Courts of Appeals to consider the ADEA's applicability to benefit programs, of the two federal agencies which have administered the Act, and of the Acting Solicitor General on behalf of the Equal Employment Opportunity Commission (EEOC) as *amicus curiae*, all of whom have concluded that it contravenes the text and history of the Act to immunize discrimination against older workers in benefit plans which is not justified by any business purpose. Agreeing with these authorities, and finding the majority's "plain language" interpretation impossibly tortured and antithetical to the ADEA's goal of eradicating baseless discrimination against older workers, I dissent.

It is common ground that appellant Public Employees Retirement System of Ohio (PERS) discriminated against appellee June Betts on account of her age. *Ante*, at 163–165. Had Betts become disabled before, rather than after, turning 60, PERS would be paying her $355.02 a month in disability benefits for the rest of her life, more than double the $158.50 a month she is now entitled to collect. It is also common ground that PERS' facially discriminatory provision was enacted after the ADEA's passage in 1967, and therefore is subject to the Act's broad antidiscrimination command, § 4(a)(1), 29 U. S. C. § 623(a)(1), *ante*, at 169,[1] and that PERS is liable to Betts for the difference between the monthly sums noted above unless PERS' benefit plan falls within the § 4(f)(2) exemption, 29 U. S. C. § 623(f)(2). *Ante*, at 165–166. Finally, it is common ground that, based on PERS' refusal to offer any explanation for the age-specific benefits it provides, its disparate treatment of older employees lacked any business justification whatsoever; indeed, the cost to PERS of its disability plan varied not at all with an employee's age. *Ante*,

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[1] I agree with the majority that neither our decision in *United Air Lines, Inc.* v. *McMann*, 434 U. S. 192 (1977), involving a plan with a mandatory retirement provision adopted prior to the passage of the ADEA, nor Congress' 1978 amendment of § 4(f)(2) in response to *McMann*, controls this case. *Ante*, at 167–169.

at 164–165.[2] For want of a better explanation, one is left to conclude that PERS denied benefits to those employees who became disabled after turning 60 solely because it wished to cut its overall disability outlays—and that PERS viewed older workers as a convenient target for its budgetary belt tightening.

This case thus presents the issue whether a benefit plan which arbitrarily imposes disparate burdens on older workers can claim succor under § 4(f)(2) from age discrimination liability. The majority arrives at the novel conclusion that the ADEA exempts from liability all discriminatory benefit programs, regardless of their justification, unless the discrimination implicates aspects of the employment relationship unrelated to the provision of benefits, and then only if the discrimination violates "the substantive provisions of the Act." *Ante*, at 176. The majority acknowledges that this reading shelters from the ADEA's purview all but a few hypothetical types of benefit plan age discrimination,[3] leaving older workers unprotected from baseless discrimination insofar as it affects the often considerable portion of overall compensation comprised by employee benefits. *Ante*, at 177, 181. The majority thus scuttles the heretofore consensus, and in my view correct, interpretation that the § 4(f)(2) ex-

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[2] It is no answer to surmise that providing disability benefits to an older worker costs more than providing equivalent benefits to a younger worker, as is typically the case with life insurance benefits. PERS, after all, provided full monthly benefits to employees over 60, so long as they had become disabled prior to attaining that age. The sole distinction PERS drew was based on an employee's age at disability, a factor that does not correlate with the cost to an employer of providing benefits. Indeed, insofar as an employer is concerned about the cumulative cost of providing benefits during the remaining life of a disabled employee, this concern militates *in favor of* older workers, whose predicted lifespans are shorter than those of younger workers.

[3] For example, if an employer refuses to provide benefits to an older worker in retaliation for filing a claim under the ADEA, a claim challenging that refusal would be cognizable. *Ante*, at 180.

emption is limited to those programs whose disparate treatment is justified by a plausible business purpose.

To reach the result it does, the majority uses an interpretive methodology, purportedly one parsing § 4(f)(2)'s "plain language," which is so manipulative as virtually to invite the charge of result-orientation. Ordinarily, we ascertain the meaning of a statutory provision by looking to its text, and, if the statutory language is unclear, to its legislative history. *Blum* v. *Stenson*, 465 U. S. 886, 896 (1984). Where these barometers offer ambiguous guidance as to Congress' intent, we defer to the interpretations of the provision articulated by the agencies responsible for its enforcement, so long as these agency interpretations are "based on a permissible construction of the statute." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984); see also *Bethesda Hospital Assn.* v. *Bowen*, 485 U. S. 399, 403 (1988); *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291 (1988).

Eschewing this approach, the majority begins its analysis not by seeking to glean meaning from the statute, but by launching a no-holds-barred attack on the business purpose reading of § 4(f)(2). *Ante*, at 169–170. Disaggregating the sentence that is § 4(f)(2)[4] into two portions, the majority concludes that the business purpose test is irreconcilable with the "plain language" of the "subterfuge" portion, *ante*, at 170–172, and also cannot be inferred from the text of the portion enumerating types of employee benefit plans, *ante*, at 173–175. En route to interring the consensus interpretation of § 4(f)(2), the majority pauses not a moment on the provi-

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[4] Section 4(f)(2) provides that it is not unlawful for an employer "to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." 29 U. S. C. § 623(f)(2).

sion's purposes or legislative history. Only after burial, and almost by afterthought, does the majority attempt to come up with its own interpretation of the exemption, hastily proceeding to divine the capacious alternative reading outlined earlier.

There are deep problems with the majority's interpretive methodology, chief among them its unwillingness to apply the same unforgiving textual analysis to its reading of the § 4(f)(2) exemption as it does to the consensus reading, and its selective use of legislative history to suggest that Congress contemplated the draconian interpretation of § 4(f)(2) the majority divines. A conventional analysis of § 4(f)(2) illuminates these methodological lapses, and yields a very different result.

Beginning with the text, the only thing plain about § 4(f)(2)'s spare language is that it offers no explicit command as to what heuristic test those applying it should use. In dispatching the consensus reading, the majority makes much of the fact that "[t]he requirement that employers show a cost-based justification for age-related reductions in benefits appears nowhere in the statute itself." *Ante*, at 170. This truism, is, however, equally applicable to the complex construction the majority adopts, under which all but certain limited species of benefit plan discrimination are exempted from the ADEA, and under which the burden of proving non-exemption is shouldered by the ADEA plaintiff.[5] Indeed,

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[5] The majority's holding that the employee bears the heavy burden of proving not only that a discriminatory benefit plan implicates nonbenefit aspects of employment, but also that it was intended to discriminate, strikes a further blow against the statutory rights of older workers. *Ante*, at 182. It is one thing for an employee to prove discrimination against older workers. It is considerably more difficult to prove that an employer undertook such discrimination with unlawful motives. In light of the severe evidentiary and practical obstacles, where discrimination in non-fringe-benefit aspects of the employment relationship has been proved, a more appropriate approach would place the burden on the employer to show that the discrimination was not born of improper intent. See *Wards*

the fact that § 4(f)(2) enumerates various types of benefit programs eligible for exemption from the ADEA's nondiscrimination command but makes no mention of disability programs strongly undercuts the majority's assertion that the text compels exemption here. This is a case in which only so much blood can be squeezed from the textual stone, and in which one therefore must turn to other sources of statutory meaning.

The structure of § 4(f)(2), on the other hand, provides considerable support for the business purpose interpretation. The majority views § 4(f)(2) as involving two separate clauses, with the first enumerating, for no apparent reason, three types of benefit plans, and the second, the "subterfuge" clause, making § 4(f)(2)'s exemption applicable except where a benefit plan is created with a "specific 'intent . . . to evade'" the ADEA. *Ante*, at 171 (citation omitted). This reading has the perverse consequence of denying the § 4(f)(2) exemption only to subtle acts of discrimination effected through a stratagem or other artifice of discrimination, while leaving it intact for those age-based distinctions like PERS which, though arbitrary, are *so* brazenly discriminatory in disentitling older workers to benefits that they cannot possibly warrant the "subterfuge" characterization. It is difficult to believe that Congress, in passing the ADEA, intended to immunize acts of unabashed discrimination against older workers.

A far more sensible structural interpretation regards the § 4(f)(2) sentence as a synthetic whole. Under this reading, the initial enumeration of "a retirement, pension, or insurance plan" serves a concrete purpose: it gives content to the ensuing word "subterfuge." All the enumerated benefit plans commonly—indeed, almost invariably—entail costs that rise with the age of the beneficiary; thus, an employer whose benefit plan treats older workers less favorably than

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Cove Packing Co. v. *Atonio*, 490 U. S. 642, 668 (1989) (STEVENS, J., dissenting).

younger ones though spending the same amount on each employee, typically has a cost-based reason for doing so. By this reading, an employer with an economic justification cannot properly be viewed as having resorted to subterfuge to evade the ADEA's command against irrelevant age distinctions. Unlike the majority's artificial bifurcation of § 4(f)(2), this holistic interpretation does not excuse express acts of unjustified age discrimination like PERS while punishing only evasive or subtle discrimination. Significantly, all the Courts of Appeals to consider § 4(f)(2) have concluded that the enumeration of benefit plans where age and cost generally correlate sheds considerable light on the scope of the exemption.[6] And once the possibility of this interpretation is admitted, the majority's sole ground for rejecting the business purpose interpretation—that it clashes with the "plain language of the statute," *ante*, at 171—necessarily falls away.

The majority's reliance on the text of the statute as a basis for rejecting the business purpose test is, finally, made puzzling in light of its concession that its "construction of the words of the statute is not the only plausible one." *Ante*, at 177. It is difficult to avoid the conclusion that the majority is using two different standards of textual analysis: the business purpose interpretation fails because the plain language

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[6] See *Betts* v. *Hamilton County Bd. of Mental Retardation and Developmental Disabilities*, 848 F. 2d 692 (CA6 1988) (case below); *EEOC* v. *Mt. Lebanon*, 842 F. 2d 1480 (CA3 1988); *Karlen* v. *City Colleges of Chicago*, 837 F. 2d 314 (CA7 1988); *Cipriano* v. *Board of Ed. of North Tonawanda School Dist.*, 785 F. 2d 51 (CA2 1986); *EEOC* v. *Westinghouse Elec. Corp.*, 725 F. 2d 211 (CA3 1983), cert. denied, 469 U. S. 820 (1984); *EEOC* v. *Borden's, Inc.*, 724 F. 2d 1390 (CA9 1984). It is true that these courts took slightly divergent analytic paths to this common result: some have interpreted § 4(f)(2) *ab initio* and others have deferred to the EEOC's statutory reading to this effect; some have imputed the business purpose requirement to the term "subterfuge" and others have instead attributed it to § 4(f)(2) more generally. This divergence, however, in no way vitiates the significance of the Courts of Appeals' unanimity that the statute supports the business purpose requirement.

of the statute does not command it, but the majority's interpretation succeeds because the plain language of the statute does not preclude it.

Given, then, that some ambiguity remains under any fair reading of § 4(f)(2)'s text and structure, it therefore is appropriate to consult its legislative history. This history convincingly supports the holistic reading and the business purpose interpretation derived therefrom. As initially introduced by Senator Ralph Yarborough in 1967, § 4(f)(2) did not recognize any circumstances that might authorize age discrimination in the provision of fringe benefits. Instead, it sheltered only the employer who "separate[s] involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act." S. 830, 90th Cong., 1st Sess. (1967).[7]

Several Senators, however, led by Senator Jacob Javits, urged that employers, in fashioning benefit programs, be allowed to consider cost differentials between benefits provided to older employees and those provided to younger ones. During Senate hearings on the bill which became the ADEA, Senator Javits criticized the initial version of § 4(f)(2), stating that that version did "not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired." Age Discrimination in Employment: Hearings on S. 830 and S. 788 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 27 (1967). Employers "faced with the necessity of paying greatly increased premiums," Senator Javits feared, might "look for excuses not

[7] The narrow scope of this initial exemption may have reflected the fact that Congress was aware that employers at that time did not regard as a major concern the benefit-program costs associated with older workers. See, *e. g.*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964, The Older American Worker: Age Discrimination in Employment 16 (1965) ("Relatively few employers . . . cited the costs of providing pension and insurance benefits as significant barriers to employment of older persons").

to hire older workers." *Ibid.* Senator George Smathers, a cosponsor of the initial bill, acknowledged in response that the bill would not permit employers to vary benefit levels to take into account the greater expense of providing some fringe benefits to older workers. *Id.*, at 29–30. He proposed amending it to permit such variations. The following day, Senator Javits proposed, as a means of incorporating his and Senator Smathers' concerns, an amendment which incorporated essentially the present language enumerating specific types of benefit plans. 113 Cong. Rec. 7077 (1967). The Javits proposal, which was ultimately adopted and which underwent only peripheral changes before the Act's enactment, was designed to ensure, in its sponsor's words, that "an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, *because of the often extremely high cost of providing certain types of benefits to older workers*, actually be discouraged from hiring older workers." 113 Cong. Rec. 31254–31255 (1967) (emphasis added).

The history of § 4(f)(2) militates in favor of the business purpose interpretation in several respects. First, it demonstrates that the sponsors of the exemption intended to protect benefit plans with economic justifications for treating older workers disparately, and did not intend categorically to immunize benefit plans from liability for unjustified discrimination. See *FEA* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 564 (1976) (statements of sponsors "deserv[e] to be accorded substantial weight in interpreting the statute").[8]

[8] The majority attempts to appropriate Senator Javits by stringing together fragments of his comments on the Senate floor. The majority cites his statement that "'the age discrimination law is not the proper place to fight' the battle of ensuring 'adequate pension benefits for older workers.'" *Ante*, at 179, quoting 113 Cong. Rec. 7076 (1967). But as the EEOC notes, this remark, read in proper context, does not suggest that "*any* type of discrimination in the provision of employee benefits should be permissible under the ADEA," but makes the more limited point that

Second, this history undercuts the majority's contention that the § 4(f)(2) term "subterfuge to evade the purposes of the Act" supports the broad exemption of benefit plans from coverage. That phrase *predated* the Javits amendment, and was part of the bill when it did not authorize any age-based discrimination in the provision of benefits. The language broadening the exemption must come instead from the enumeration language added at Senator Javits' behest, language most properly read to import only the business purpose test. Third, at no point during the debate on § 4(f)(2) did any legislator come even remotely close to endorsing the construction of § 4(f)(2) chosen by the majority. This silence is hardly surprising, given that an unqualified exemption contravenes Congress' overarching goal in passing the ADEA of protecting older workers against arbitrary discrimination. The business purpose test, on the other hand, advances this goal, playing the hardly radical role of ensuring that, where *no* justification exists for disparate age-based treatment, older workers are not saddled with burdens that should be shared by all workers or by their employer.[9]

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certain existing pension plans with lengthy vesting periods "should be changed by comprehensive pension legislation rather than by an age discrimination statute." Brief for EEOC as *Amicus Curiae* 17, n. 9 (emphasis added). Senator Javits eventually proposed, and won the enactment of, such legislation. See 29 U. S. C. § 1053 (1982 ed. and Supp. V). Similarly, Senator Javits' statement that amended § 4(f)(2) provides "'a fairly broad exemption . . . for bona fide retirement and seniority systems,'" *ante*, at 179, quoting 113 Cong. Rec. 7076 (1967), fully accords with the business purpose test. That test exempts from § 4(f)(2)'s coverage any act of age discrimination with some legitimate business basis—leaving unprotected only the presumably narrow band of benefit programs, like PERS, which practice unjustified age discrimination.

[9] That Congress viewed the § 4(f)(2) exemption as bounded by a business purpose requirement was, if anything, confirmed in 1978, when Congress added a clause in response to *United Air Lines, Inc.* v. *McMann*, 434 U. S. 192 (1977). In rejecting a claim that a plan adopted before the ADEA's enactment could be a subterfuge, *McMann* declined to hold that a "*per se* rule requir[ed] an employer to show an economic or business pur-

Even if I did not strongly believe that the text and structure of the § 4(f)(2) exemption, as informed by its legislative history, limit the exemption to benefit plans whose discrimination against older workers rests on some business justification, I would still conclude that adoption of the business purpose test is mandated under *Chevron*'s admonishment to defer to enforcement agencies' reasonable interpretations of ambiguous statutory provisions. See *Western Air Lines, Inc.* v. *Criswell*, 472 U. S. 400, 412 (1985) (deferring to Department of Labor and EEOC on interpretation of ADEA). Shortly after the ADEA's passage, the Department of Labor, which originally administered the Act, interpreted § 4(f)(2) to allow employers to discriminate on the basis of age in the provision of employee benefits, but only where providing such benefits was more expensive for older workers. See 29 CFR § 860.120(a) (1970). Where cost did not vary with age, the Department of Labor concluded, § 4(f)(2) did not exempt from ADEA scrutiny discriminatory benefit programs. See § 860.120(b) ("Not all employee benefit plans, but only those similar to the kind enumerated in section 4(f)(2) of the Act come within this provision," and thus profit-sharing and other plans lacking an economic basis for discriminating against older workers were not exempted by § 4(f)(2)); 34 Fed. Reg.

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pose in order to satisfy the subterfuge language of the Act." 434 U. S., at 203. This statement, referring only to pre-ADEA plans, left open the issue of a *per se* business purpose rule for discriminatory plan provisions adopted after the Act's passage. Reiterating the need for an economic justification for discrimination, Senator Javits stated during the 1978 debate: "The meaning of the exception, as I stated in [the 1967] colloquy with Senator Yarborough on the Senate floor, was that an 'employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers.'" 124 Cong. Rec. 8218 (1978). The Senator explained that "[w]elfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers." *Ibid.*

9709 (1969) (same).[10] The EEOC, to which responsibility for enforcing the ADEA was transferred in 1979, adopted *in toto* Labor's business purpose interpretation of § 4(f)(2). The EEOC's regulations state that § 4(f)(2)'s purpose "is to permit age-based reductions in employee benefit plans *where such reductions are justified by significant cost considerations.*" 29 CFR § 1625.10(a)(1) (1988) (emphasis added).[11] The majority's derogation of this dual agency interpretation leaves one to wonder why, when important civil rights laws are at issue, the Court fails to adhere with consistency to its so often espoused policy of deferring to expert agency judgment on ambiguous statutory questions. See, *e. g.*, *General Electric*

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[10] The majority's dismissal of this administrative interpretation of § 4(f)(2) on the ground that it was not contemporaneously issued is disingenuous. In the majority's view, the Department of Labor initially articulated a broad "safe harbor" exemption for benefit programs, and only in 1979 revised its interpretation to adopt the business purpose test. *Ante*, at 171–172. The sole support the majority adduces for this proposition is the Department of Labor's 1969 regulation providing that age-related benefit reductions would be "'considered in compliance with the statute'" if cost justified. *Ante*, at 171, quoting 29 CFR § 860.120(a) (1970). This regulation does not demonstrate that Labor was applying a business purpose test, the majority suggests, apparently because the regulation failed explicitly to state the corollary proposition that non-cost-justified plans fall outside the statutory exemption. This tenuous reading fails to explain (1) why Labor saw a need to include the cost-justification qualification in its reading of the exemption; (2) why Labor stated that profit-sharing plans, lacking an economic basis for age discriminating, fall outside the exemption; and (3) why Labor, in its 1979 pronouncement, in no way suggested it was changing its construction of § 4(f)(2).

[11] See also 29 CFR § 1625.10(a)(1) (1988) ("A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage"); § 1625.10(d) ("[A] plan or plan provision which prescribes lower benefits for older employees on account of age is not a 'subterfuge' within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations").

Co. v. *Gilbert*, 429 U. S. 125, 155–156 (1976) (BRENNAN, J., dissenting).

The majority today puts aside conventional tools of statutory construction and, relying instead on artifice and invention, arrives at a draconian interpretation of the ADEA which Congress most assuredly did not contemplate, let alone share, in 1967, in 1978, or now. Because I cannot accept that it is the ADEA's command to give employers a free hand to fashion discriminatory benefit programs, I dissent.

Syllabus

DUCKWORTH *v.* EAGAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 88–317. Argued March 29, 1989—Decided June 26, 1989

Respondent, when first questioned by Indiana police in connection with a stabbing, made an exculpatory statement after being read and signing a waiver form that provided, *inter alia*, that if he could not afford a lawyer, one would be appointed for him "if and when you go to court." However, 29 hours later, he was interviewed again, signed a different waiver form, confessed to the stabbing, and led officers to a site where they recovered relevant physical evidence. Over respondent's objection, his two statements were admitted into evidence at trial. After the Indiana Supreme Court upheld his conviction for attempted murder, respondent sought a writ of habeas corpus in the District Court claiming, among other things, that his confession was inadmissible because the first waiver form did not comply with the requirements of *Miranda* v. *Arizona*, 384 U. S. 436. The District Court denied the petition, holding that the record clearly manifested adherence to *Miranda*. The Court of Appeals reversed on the ground that the advice that counsel will be appointed "if and when you go to court" was constitutionally defective because it denied the indigent accused a clear and unequivocal warning of the right to appointed counsel before interrogation and linked that right to a future event.

Held: Informing a suspect that an attorney would be appointed for him "if and when you go to court" does not render *Miranda* warnings inadequate. Pp. 200–205.

(a) *Miranda* warnings need not be given in the exact form described in *Miranda* but simply must reasonably convey to a suspect his rights. The initial warnings given to respondent—that he had a right to remain silent, that anything he said could be used against him in court, that he had the right to speak to an attorney before and during questioning even if he could not afford to hire one, that he had the right to stop answering questions at any time until he talked to a lawyer, and that the police could not provide him with a lawyer but one would be appointed "if and when you go to court"—touched all of the bases required by *Miranda*. Pp. 201–203.

(b) The Court of Appeals misapprehended the effect of the "if and when you go to court" language. This instruction accurately reflects In-

diana's procedure for appointment of counsel, which does not occur until a defendant's first court appearance, and it anticipates a suspect's question as to when he will obtain counsel. Pp. 203–204.

(c) *Miranda* does not require that attorneys be producible on call, but only that the suspect be informed of his right to an attorney and to appointed counsel, and that if the police cannot provide appointed counsel, they will not question him until he waives, as respondent did, his right to counsel. P. 204.

(d) Respondent's reliance on *California* v. *Prysock*, 453 U. S. 355—which held that *Miranda* warnings would not be sufficient "if the reference to the right to appointed counsel was linked [to a] future point in time *after* police interrogation"—is misplaced since *Prysock* involved warnings that did not apprise the accused of his right to have an attorney present if he chose to answer questions. However, of the eight sentences in respondent's first warning, one described his right to counsel "before [the police] ask[ed] [him] questions," while another stated his right "to stop answering at any time until [he] talk[ed] to a lawyer." Pp. 204–205.

843 F. 2d 1554, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 205. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, and in Part I of which BLACKMUN and STEVENS, JJ., joined, *post*, p. 214.

David Michael Wallman, Deputy Attorney General of Indiana, argued the cause for petitioner. With him on the briefs were *Linley E. Pearson*, Attorney General, and *Robert S. Spear* and *Michael A. Schoening*, Deputy Attorneys General.

Michael R. Lazerwitz argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Dennis*, *Deputy Solicitor General Bryson*, and *Joel M. Gershowitz*.

Howard B. Eisenberg, by appointment of the Court, 488 U. S. 921 (1988), argued the cause and filed a brief for respondent.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent confessed to stabbing a woman nine times after she refused to have sexual relations with him, and he was convicted of attempted murder. Before confessing, respondent was given warnings by the police, which included the advice that a lawyer would be appointed "if and when you go to court." The United States Court of Appeals for the Seventh Circuit held that such advice did not comply with the requirements of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). We disagree and reverse.

Late on May 16, 1982, respondent contacted a Chicago police officer he knew to report that he had seen the naked body of a dead woman lying on a Lake Michigan beach. Respondent denied any involvement in criminal activity. He then took several Chicago police officers to the beach, where the woman was crying for help. When she saw respondent, the woman exclaimed: "Why did you stab me? Why did you stab me?" Respondent told the officers that he had been with the woman earlier that night, but that they had been attacked by several men who abducted the woman in a van.

The next morning, after realizing that the crime had been committed in Indiana, the Chicago police turned the investigation over to the Hammond, Indiana, Police Department. Respondent repeated to the Hammond police officers his story that he had been attacked on the lakefront, and that the woman had been abducted by several men. After he filled out a battery complaint at a local police station, respondent agreed to go to the Hammond police headquarters for further questioning.

At about 11 a.m., the Hammond police questioned respondent. Before doing so, the police read to respondent a waiver form, entitled "Voluntary Appearance; Advice of Rights," and they asked him to sign it. The form provided:

> "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. *You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning.* You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer." 843 F. 2d 1554, 1555–1556 (CA7 1988) (emphasis added).[1]

Respondent signed the form and repeated his exculpatory explanation for his activities of the previous evening.

Respondent was then placed in the "lockup" at the Hammond police headquarters. Some 29 hours later, at about 4 p.m. on May 18, the police again interviewed respondent. Before this questioning, one of the officers read the following waiver form to respondent:

> "1. Before making this statement, I was advised that I have the right to remain silent and that anything I

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[1] The remainder of the form signed by respondent provided:

"I, *[Gary Eagan,]* have come to the Detective Bureau of the Hammond, Indiana Police Department, of my own choice to talk with Officers . . . In [sic] regard to an investigation they are conducting. I know that I am not under arrest and that I can leave this office if I wish to do so.

"Prior to any questioning, I was furnished with the above statement of my rights . . . . I have (read) (had read to me) this statement of my rights. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me." 843 F. 2d, at 1560, n. 2.

might say may or will be used against me in a court of law.

"2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.

"3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.

"4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.

"5. That if I do not hire an attorney, one will be provided for me." *Id.*, at 1556.

Respondent read the form back to the officers and signed it. He proceeded to confess to stabbing the woman. The next morning, respondent led the officers to the Lake Michigan beach where they recovered the knife he had used in the stabbing and several items of clothing.

At trial, over respondent's objection, the state court admitted his confession, his first statement denying any involvement in the crime, the knife, and the clothing. The jury found respondent guilty of attempted murder, but acquitted him of rape. He was sentenced to 35 years' imprisonment. The conviction was upheld on appeal. *Eagan* v. *State*, 480 N. E. 2d 946 (Ind. 1985).

Respondent sought a writ of habeas corpus in the United States District Court for the Northern District of Indiana, claiming, *inter alia*, that his confession was inadmissible because the first waiver form did not comply with *Miranda*. The District Court denied the petition, holding that the record "clearly manifests adherence to *Miranda* . . . espe-

cially as to the so-called second statement." App. to Pet. for Cert. A52.

A divided United States Court of Appeals for the Seventh Circuit reversed. 843 F. 2d 1554 (1988). The majority held that the advice that counsel would be appointed "if and when you go to court," which was included in the first warnings given to respondent, was "constitutionally defective because it denies an accused indigent a clear and unequivocal warning of the right to appointed counsel before any interrogation," and "link[s] an indigent's right to counsel before interrogation with a future event." *Id.*, at 1557. The majority relied on the Seventh Circuit's decision in *United States ex rel. Williams* v. *Twomey*, 467 F. 2d 1248, 1250 (1972), which had condemned, as "misleading and confusing," the inclusion of "if and when you go to court" language in *Miranda* warnings. Turning to the admissibility of respondent's confession, the majority thought that "as a result of the first warning, [respondent] arguably believed that he could not secure a lawyer during interrogation" and that the second warning "did not explicitly correct this misinformation." 843 F. 2d, at 1558. It therefore remanded the case for a determination whether respondent had knowingly and intelligently waived his right to an attorney during the second interview. The dissenting judge rejected the majority's "formalistic, technical and unrealistic application of *Miranda*" and argued that the first warnings passed constitutional muster. *Id.*, at 1562. In any case, he thought that remand was not necessary because the record indicated that this case was covered by *Oregon* v. *Elstad*, 470 U. S. 298 (1985). 843 F. 2d, at 1570–1571.

The Court of Appeals denied rehearing en banc, with four judges dissenting from that order. App. to Pet. for Cert. A1–A2. We then granted certiorari, 488 U. S. 888 (1988), to resolve a conflict among the lower courts as to whether informing a suspect that an attorney would be appointed for him "if and when you go to court" renders *Miranda* warn-

ings inadequate.[2] We agree with the majority of the lower courts that it does not.[3]

In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the Court established certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation. In now-familiar words, the Court said that the

[2] The majority of federal and state courts to consider the issue have held that warnings that contained "if and when you go to court" language satisfied *Miranda*. See *Wright* v. *North Carolina*, 483 F. 2d 405, 406–407 (CA4 1973), cert. denied, 415 U. S. 936 (1974); *Massimo* v. *United States*, 463 F. 2d 1171, 1174 (CA2 1972), cert. denied, 409 U. S. 1117 (1973); *United States* v. *Lacy*, 446 F. 2d 511, 513 (CA5 1971); *State* v. *Sterling*, 377 So. 2d 58, 62–63 (La. 1979); *Harrell* v. *State*, 357 So. 2d 643, 645–646 (Miss. 1978); *Rowbotham* v. *State*, 542 P. 2d 610, 618–619 (Okla. Crim. App. 1975); *Grennier* v. *State*, 70 Wis. 2d 204, 213–215, 234 N. W. 2d 316, 321–322 (1975); *Schade* v. *State*, 512 P. 2d 907, 915–916 (Alaska 1973); *State* v. *Mumbaugh*, 107 Ariz. 589, 596–597, 491 P. 2d 443, 450–451 (1971); *People* v. *Campbell*, 26 Mich. App. 196, 201–202, 182 N. W. 2d 4, 6–7 (1970), cert. denied, 401 U. S. 945 (1971); *People* v. *Swift*, 32 App. Div. 2d 183, 186–187, 300 N. Y. S. 2d 639, 643–644 (1969), cert. denied, 396 U. S. 1018 (1970). Other courts, although not using the precise "if and when you go to court" language, have held *Miranda* was satisfied by a warning that an attorney could not be appointed for a suspect until he appeared in court. See *United States* v. *Contreras*, 667 F. 2d 976, 979 (CA11), cert. denied, 459 U. S. 849 (1982); *Coyote* v. *United States*, 380 F. 2d 305, 308 (CA10), cert. denied, 389 U. S. 992 (1967); *State* v. *Maluia*, 56 Haw. 428, 431–435, 539 P. 2d 1200, 1205–1207 (1975); *Emler* v. *State*, 259 Ind. 241, 243–244, 286 N. E. 2d 408, 410–411 (1972); *Jones* v. *State*, 69 Wis. 2d 337, 343–345, 230 N. W. 2d 677, 682–683 (1975).

On the other hand, a minority of federal and state courts, including the Seventh Circuit in this case, have held that "if and when you go to court" language did not satisfy *Miranda*. See *United States ex rel. Williams* v. *Twomey*, 467 F. 2d 1248, 1249–1250 (CA7 1972); *Gilpin* v. *United States*, 415 F. 2d 638, 641 (CA5 1969); *State* v. *Dess*, 184 Mont. 116, 120–122, 602 P. 2d 142, 144–145 (1979); *Commonwealth* v. *Johnson*, 484 Pa. 349, 352–357, 399 A. 2d 111, 112–114 (1979); *Square* v. *State*, 283 Ala. 548, 550, 219 So. 2d 377, 378–379 (1969).

[3] Petitioner does not argue, and we therefore need not decide, whether *Stone* v. *Powell*, 428 U. S. 465 (1976), should be extended to bar relitigation on federal habeas of nonconstitutional claims under *Miranda*.

suspect must be told that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.*, at 479. The Court in *Miranda* "presumed that interrogation in certain custodial circumstances is inherently coercive and . . . that statements made under those circumstances are inadmissible unless the suspect is specifically warned of his *Miranda* rights and freely decides to forgo those rights." *New York* v. *Quarles*, 467 U. S. 649, 654 (1984) (footnote omitted).

We have never insisted that *Miranda* warnings be given in the exact form described in that decision.[4] In *Miranda* itself, the Court said that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant." 384 U. S., at 476 (emphasis added). See also *Rhode Island* v. *Innis*, 446 U. S. 291, 297 (1980) (referring to "the now familiar *Miranda* warnings . . . or their equivalent"). In *California* v. *Prysock*, 453 U. S. 355 (1981) *(per curiam)*, we stated that "the 'rigidity' of *Miranda* [does not] exten[d] to the precise formulation of the warnings given a criminal defendant," and

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[4] For example, the standard *Miranda* warnings used by the Federal Bureau of Investigation provide as follows:

"Before we ask you any questions, you must understand your rights.

"You have the right to remain silent.

"Anything you say can be used against you in court.

"You have the right to talk to a lawyer for advice before we ask you any questions and to have a lawyer with you during questioning.

"If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

"If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer." Brief for United States as *Amicus Curiae* 1–2, n. 1.

that "no talismanic incantation [is] required to satisfy its strictures." *Id.*, at 359.

Miranda has not been limited to station house questioning, see *Rhode Island* v. *Innis*, *supra* (police car), and the officer in the field may not always have access to printed *Miranda* warnings, or he may inadvertently depart from routine practice, particularly if a suspect requests an elaboration of the warnings. The prophylactic *Miranda* warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974). Reviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably "conve[y] to [a suspect] his rights as required by *Miranda*." *Prysock*, *supra*, at 361.

We think the initial warnings given to respondent touched all of the bases required by *Miranda*. The police told respondent that he had the right to remain silent, that anything he said could be used against him in court, that he had the right to speak to an attorney before and during questioning, that he had "this right to the advice and presence of a lawyer even if [he could] not afford to hire one," and that he had the "right to stop answering at any time until [he] talked to a lawyer." 843 F. 2d, at 1555–1556. As noted, the police also added that they could not provide respondent with a lawyer, but that one would be appointed "if and when you go to court." The Court of Appeals thought this "if and when you go to court" language suggested that "only those accused who can afford an attorney have the right to have one present before answering any questions," and "implie[d] that if the accused does not 'go to court,' *i. e.*[,] the government does not file charges, the accused is not entitled to [counsel] at all." *Id.*, at 1557.

In our view, the Court of Appeals misapprehended the effect of the inclusion of "if and when you go to court" language

in *Miranda* warnings. First, this instruction accurately described the procedure for the appointment of counsel in Indiana. Under Indiana law, counsel is appointed at the defendant's initial appearance in court, Ind. Code § 35–33–7–6 (1988), and formal charges must be filed at or before that hearing, § 35–33–7–3(a).[5] We think it must be relatively commonplace for a suspect, after receiving *Miranda* warnings, to ask *when* he will obtain counsel. The "if and when you go to court" advice simply anticipates that question.[6] Second, *Miranda* does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one.[7] The Court in *Miranda* emphasized that it was not suggesting that "each police station must have a 'station house lawyer' present at all times to advise prisoners." 384 U. S., at 474. If the police cannot provide appointed counsel, *Miranda* requires only that the police not question a suspect unless he waives his right to counsel. *Ibid.* Here, respondent did just that.

Respondent relies, Brief for Respondent 24–29, on language in *California* v. *Prysock*, where we suggested that *Miranda* warnings would not be sufficient "if the reference to the right to appointed counsel was linked [to a] future point in time *after* the police interrogation." 453 U. S., at 360 (emphasis added). The Court of Appeals also referred to *Prysock* in finding deficient the initial warnings given to re-

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[5] In federal court, the defendant's initial hearing, at which counsel is appointed, may occur before the filing of the indictment or information. Fed. Rules Crim. Proc. 5(a), (c).

[6] At oral argument, the United States said that the federal law enforcement officials do not use this language in order to avoid "unnecessary litigation." Tr. of Oral Arg. 16.

[7] In *Miranda*, the Court stated that the FBI's then-current practice of informing suspects "of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge," 384 U. S., at 486, was "consistent with the procedure which we delineate today," *id.*, at 484.

spondent. 843 F. 2d, at 1557. But the vice referred to in *Prysock* was that such warnings would not apprise the accused of his right to have an attorney present if he chose to answer questions. The warnings in this case did not suffer from that defect. Of the eight sentences in the initial warnings, one described respondent's right to counsel "before [the police] ask[ed] [him] questions," while another stated his right to "stop answering at any time until [he] talk[ed] to a lawyer." *Id.*, at 1555–1556. We hold that the initial warnings given to respondent, in their totality, satisfied *Miranda*, and therefore that his first statement denying his involvement in the crime, as well as the knife and the clothing, was properly admitted into evidence.

The Court of Appeals thought it necessary to remand this case for consideration of whether respondent's second statement was tainted by the first warnings. *Id.*, at 1557–1558. In view of our disposition of this case, we need not reach that question.[8] The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with our decision.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA joins, concurring.

I concur in THE CHIEF JUSTICE's opinion for the Court. I write separately to address an alternative ground for decision in this case which was raised, but not relied upon, by the District Court. In my view, the rationale of our decision in *Stone* v. *Powell*, 428 U. S. 465 (1976), dictates that the suppression remedy be unavailable to respondent on federal habeas.

[8] Respondent argues that the second set of *Miranda* warnings he received were deficient. Brief for Respondent 38–40. These specific warnings have been upheld by the Seventh Circuit, *Richardson* v. *Duckworth*, 834 F. 2d 1366 (CA7 1987), and the Indiana Supreme Court, *Robinson* v. *State*, 272 Ind. 312, 397 N. E. 2d 956 (1979), and we think they plainly comply with *Miranda*.

I

Over seven years ago respondent stabbed a woman nine times after she refused to have sexual relations with him. Claiming that he had innocently discovered the body, respondent led Chicago police to the woman, who, upon seeing respondent, immediately identified him as her assailant. Respondent was twice informed of his rights and questioned by detectives. The first time he gave an exculpatory statement indicating that he had been attacked by the same persons who had assaulted the victim. In the second interview, respondent confessed to the stabbing. He then led police to the knife he had used and to several items of his clothing which were found near the scene of the assault. Respondent sought suppression of both his statements and the knife and clothing on the ground that the warnings he was given were inadequate under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). After an evidentiary hearing, the trial court denied the motion to suppress. The evidence was admitted at trial, and respondent was convicted of attempted murder and sentenced to 35 years' imprisonment. On appeal, the Indiana Supreme Court rejected respondent's claim that the warnings given him during his first encounter with the police were insufficient under *Miranda*. *Eagan* v. *State*, 480 N. E. 2d 946, 949–950 (1985). The Indiana Supreme Court also noted that there was no evidence that respondent's two statements were the product of police coercion or overbearing. *Id.*, at 950.

In 1986, respondent filed this petition for federal habeas corpus under 28 U. S. C. §2254. He raised the same *Miranda* claim which had been fully litigated in, and rejected by, the state courts. The District Court noted the possibility that respondent's claim might not be cognizable on federal habeas under our decision in *Stone* v. *Powell*, but indicated that "[f]or present purposes that issue remains to be solved by the Supreme Court or this Circuit." App. to Pet. for Cert. A–50. The District Court found no evidence of "coer-

cive conduct" on the part of the police in this case, and denied the petition. *Id.*, at A–52—A–53. A divided panel of the Court of Appeals for the Seventh Circuit reversed, finding that a technical violation of the *Miranda* rule had occurred, and remanding the case to the District Court for a further evidentiary hearing to determine whether respondent's second statement was "tainted" by the allegedly inadequate warnings given in the first encounter. 843 F. 2d 1554, 1557 (1988). This Court now reverses. Eighteen state and federal judges have now given plenary consideration to respondent's *Miranda* claims. None of these judges has intimated any doubt as to respondent's guilt or the voluntariness and probative value of his confession. After seven years of litigation, the initial determination of the *Miranda* issue by the state trial judge and the Indiana Supreme Court has been found to be the correct one. In my view, the federal courts' exercise of habeas jurisdiction in this case has served no one: no violation of the Fifth Amendment itself has ever been alleged; there is no doubt that respondent is guilty of the crime of which he was convicted and deserving of punishment; respondent had a full and fair opportunity to litigate his claim in state court; and the marginal possibility that police adherence to *Miranda* will be enhanced by suppression of highly probative evidence some seven years after the police conduct at issue in this case is far outweighed by the harm to society's interest in punishing and incapacitating those who violate its criminal laws.

II

In *Stone* v. *Powell* this Court held that claims that probative evidence should have been excluded at trial because of police conduct alleged to have violated the Fourth Amendment would not be entertained in a federal habeas proceeding where a full and fair opportunity to litigate the claim had been made available in the state courts. The *Stone* Court noted that the exclusionary rule "'is a judicially created remedy designed to safeguard Fourth Amendment rights gener-

ally through its deterrent effect.'" 428 U. S., at 486, quoting *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). The costs of such a rule are high: highly probative and often conclusive evidence of a criminal defendant's guilt is withheld from the trier of fact in the hope of "encourag[ing] those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." *Stone*, *supra*, at 492. The exclusionary rule is a structural device designed to promote sensitivity to constitutional values through its deterrent effect. As such, the rule's utility must, as this Court has long recognized, be weighed against other important values in its application. Where the rule's deterrent effect is likely to be marginal, or where its application offends other values central to our system of constitutional governance or the judicial process, we have declined to extend the rule to that context. See, *e. g.*, *United States* v. *Leon*, 468 U. S. 897, 920–921 (1984) (refusing to apply exclusionary rule where police rely in good faith on a warrant issued by a neutral magistrate); *Calandra*, *supra*, at 349 (refusing to extend the rule to grand jury proceedings because its application "would seriously impede the grand jury"); *Walder* v. *United States*, 347 U. S. 62, 65 (1954) (exclusionary rule does not create "a shield against contradiction of [the defendant's] untruths" and evidence seized in violation of the Fourth Amendment may be used for impeachment purposes).

In *Stone*, we found that application of the exclusionary rule to Fourth Amendment violations on federal habeas was likely to have only marginal effectiveness in deterring police misconduct, while offending important principles of federalism and finality in the criminal law which have long informed the federal courts' exercise of habeas jurisdiction. In my view, this same weighing process leads ineluctably to the conclusion that the suppression remedy should not be available on federal habeas where the state courts have accorded a petitioner a full and fair opportunity to litigate a claim that

Miranda warnings were not given or were somehow deficient. Indeed, the scales appear to me to tip further toward finality and repose in this context than in *Stone* itself.

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The Amendment has its roots in the Framers' belief that a system of justice in which the focus is on the extraction of proof of guilt from the criminal defendant himself is often an adjunct to tyranny and may lead to the conviction of innocent persons. Thus, a violation of the constitutional guarantee occurs when one is "compelled" by governmental coercion to bear witness against oneself in the criminal process. See *Colorado* v. *Connelly*, 479 U. S. 157, 163–164, and n. 1 (1986); *Malloy* v. *Hogan*, 378 U. S. 1, 6–8 (1964). The suppression remedy is quite possibly contained within the guarantee of the Fifth Amendment itself.

The *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself. The *Miranda* Court implicitly acknowledged as much when it indicated that procedures other than the warnings dictated by the Court's opinion might satisfy constitutional concerns, see *Miranda*, 384 U. S., at 444, and what was implicit in the *Miranda* opinion itself has been made explicit in our subsequent cases. See, *e. g.*, *Oregon* v. *Elstad*, 470 U. S. 298, 306–310 (1985) (noting that the *Miranda* rule "sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation"); accord, *New York* v. *Quarles*, 467 U. S. 649 (1984); *Michigan* v. *Tucker*, 417 U. S. 433, 442–446 (1974). Like all prophylactic rules, the *Miranda* rule "overprotects" the value at stake. In the name of efficient judicial administration of the Fifth Amendment guarantee and the need to create institutional respect for Fifth Amendment values, it sacrifices society's interest in uncovering evidence of crime and punishing those who violate its laws. While this balance of interests may be perfectly justified in the context of direct review of criminal convic-

tions, in my view the balance shifts when applied to a presumptively final criminal judgment which is collaterally attacked in a federal habeas corpus proceeding. As JUSTICE KENNEDY has recently noted:

> "[F]ederal habeas review itself entails significant costs. It disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harris* v. *Reed*, 489 U. S. 255, 282 (1989) (dissenting opinion).

Indeed, within weeks after our decision in *Miranda*, we declined to apply that decision retroactively to state prisoners on federal habeas, noting that the *Miranda* rule was unrelated to the truth seeking function of the criminal trial, and that its application on federal habeas "would require the retrial or release of numerous prisoners found guilty by trustworthy evidence." *Johnson* v. *New Jersey*, 384 U. S. 719, 730–731 (1966). As in the Fourth Amendment context addressed in *Stone*, we have consistently declined to extend the *Miranda* rule and the suppression remedy attached to it to situations where its deterrent effect is minimal and is outweighed by other compelling interests. See, *e. g.*, *Oregon* v. *Hass*, 420 U. S. 714, 722–723 (1975) (statements taken in violation of *Miranda* may be used to impeach the defendant's testimony at trial); *Tucker*, 417 U. S., at 448–449 (refusing to apply suppression remedy to third party testimony alleged to be the fruits of a *Miranda* violation); *id.*, at 461 (WHITE, J., concurring in judgment) ("The arguable benefits from excluding such testimony by way of possibly deterring police conduct that might compel admissions are, in my view, far outweighed by the advantages of having relevant and probative testimony, not obtained by actual coercion, available at criminal trials to aid in the pursuit of truth").

In my view, these principles compel the conclusion that *Miranda* claims seeking suppression of probative evidence are not cognizable on federal habeas. Title 28 U. S. C. § 2243 requires a federal habeas court to "dispose of the matter as law and justice require," and we have long recognized that "in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power." *Francis* v. *Henderson*, 425 U. S. 536, 539 (1976). Relitigation of *Miranda* claims offers little or no additional structural incentive to the police to abide by the dictates of that decision. The awarding of habeas relief years after conviction will often strike like lightning, and it is absurd to think that this added possibility of exclusion years after the police conduct at issue will have any appreciable effect on police training or behavior. As Judge Friendly wrote: "The mere failure to administer *Miranda* warnings . . . creates little risk of unreliability, and the deterrent value of permitting collateral attack goes beyond the point of diminishing returns." Friendly, Is Innocence Irrelevant?, Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 163 (1970). On the other hand, the costs of suppression in the federal habeas setting are significantly magnified. As in this case, lower federal courts often sit in "review" of the judgments of the highest courts of a state judicial system. This situation has always been a flashpoint of tension in the delicate relationship of the federal and state courts, and this exercise of federal power should not be undertaken lightly where no significant federal values are at stake. Perhaps most troubling is the cost to society in the efficient enforcement of its criminal laws. Excluding probative evidence years after trial, when a new trial may be a practical impossibility, will often result in the release of an admittedly guilty individual who may pose a continuing threat to society. While federal courts must and do vindicate constitutional values outside the truth seeking function of a criminal trial, where those values are

unlikely to be served by the suppression remedy, the result is positively perverse. Exclusion in such a situation teaches not respect for the law, but casts the criminal system as a game and sends the message that society is so unmoved by the violation of its own laws that it is willing to frustrate their enforcement for the smallest of returns. If *Stone* v. *Powell* bars relitigation of allegations of constitutional violations on federal habeas, it seems to me clear that its rationale is directly applicable to relitigation of nonconstitutional claims under *Miranda*.

JUSTICE MARSHALL's dissenting opinion accuses me of exhibiting "a profound distaste for *Miranda*," *post*, at 224, in suggesting that the rationale of *Stone* v. *Powell* should be applied to *Miranda* claims on federal habeas review. It is not a sign of disrespect for a particular substantive rule to refuse to apply it in a situation where it does not serve the purposes for which it was designed. Our jurisprudence has long recognized a distinction between direct and collateral review, and I am not the first Justice of this Court to suggest that prophylactic rules should be treated differently in collateral proceedings than on direct review. See, *e. g.*, *Greer* v. *Miller*, 483 U. S. 756, 767–769 (1987) (STEVENS, J., concurring) (distinguishing between direct review and collateral proceedings for purposes of application of rule of *Doyle* v. *Ohio*, 426 U. S. 610 (1976), which forbids prosecutorial comment on postarrest silence); *Brewer* v. *Williams*, 430 U. S. 387, 420–429 (1977) (Burger, C. J., dissenting) (suggesting applicability of *Stone* v. *Powell* to *Miranda* claims on federal habeas); see also *Rose* v. *Lundy*, 455 U. S. 509, 543–544, and n. 8 (1982) (STEVENS, J., dissenting); *Vasquez* v. *Hillery*, 474 U. S. 254, 272–273 (1986) (Powell, J., dissenting). Indeed, in *United States* v. *Timmreck*, 441 U. S. 780 (1979), a unanimous Court concluded that a purely formal violation of Federal Rule of Criminal Procedure 11 did not justify the granting of relief in collateral proceedings despite the fact that at the time of our decision in *Timmreck* such a violation

was often considered grounds for automatic reversal on direct review. See *McCarthy* v. *United States*, 394 U. S. 459 (1969). The distinction did not lie in any "profound distaste" for the dictates of Rule 11, but rather upon considerations of finality which have special force in the context of a collateral proceeding challenging a final criminal judgment. *Timmreck*, *supra*, at 784.

The dissent's charges of "judicial activism" and its assertion that "Congress has determined" that collateral review of claims like those at issue in this case outweighs any interests in bringing a final resolution to the criminal process, see *post*, at 222, 228, ring quite hollow indeed in the context of the federal habeas statute. The scope of federal habeas corpus jurisdiction has undergone a substantial *judicial* expansion, and a return to what "Congress intended" would reduce the scope of habeas jurisdiction far beyond the extension of *Stone* v. *Powell* to *Miranda* claims. See *Kuhlmann* v. *Wilson*, 477 U. S. 436, 445–446 (1986) (plurality opinion) ("Until the early years of this century, the substantive scope of the federal habeas corpus statutes was defined by reference to the scope of the writ at common law . . . . During this century, the Court gradually expanded the grounds on which habeas corpus relief was available"); see also *Rose*, *supra*, at 546–548 (STEVENS, J., dissenting); *Fay* v. *Noia*, 372 U. S. 391, 445 (1963) (Clark, J., dissenting); *id.*, at 448 (Harlan, J., dissenting). As noted above, the Court has long recognized that "habeas corpus has been traditionally regarded as governed by equitable principles," *id.*, at 438 (citation omitted), and thus has long defined the scope of the writ by reference to a balancing of state and federal interests which the dissent today condemns as "activism."

While the State did not raise the applicability of *Stone* v. *Powell* to respondent's *Miranda* claim below or in its petition for certiorari, there is language in *Stone* which suggests that the bar it raises to relitigation of certain claims on federal habeas is jurisdictional or quasi-jurisdictional in nature.

Stone, 428 U. S., at 482, and n. 17. Other parts of the opinion appear to rest on the equitable nature of the writ of habeas corpus and the equity court's power to withhold certain forms of relief. *Id.*, at 494–495, n. 37. Since I do not read the Court's opinion as foreclosing the analysis outlined above, I join the Court's opinion and judgment.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, and with whom JUSTICE BLACKMUN and JUSTICE STEVENS join as to Part I, dissenting.

The majority holds today that a police warning advising a suspect that he is entitled to an appointed lawyer only "if and when he goes to court" satisfies the requirements of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The majority reaches this result by seriously mischaracterizing that decision. Under *Miranda*, a police warning must "*clearly infor[m]*" a suspect taken into custody "that if he cannot afford an attorney one will be appointed for him *prior to any questioning* if he so desires." *Id.*, at 471, 479 (emphasis added). A warning qualified by an "if and when you go to court" caveat does nothing of the kind; instead, it leads the suspect to believe that a lawyer will not be provided until some indeterminate time in the future *after questioning*. I refuse to acquiesce in the continuing debasement of this historic precedent, see, *e. g.*, *Oregon* v. *Elstad*, 470 U. S. 298 (1985); *New York* v. *Quarles*, 467 U. S. 649 (1984), and therefore dissent. I also write to express my disagreement with JUSTICE O'CONNOR's uninvited suggestion that the rationale of *Stone* v. *Powell*, 428 U. S. 465 (1976), should be extended to bar federal habeas review of *Miranda* claims.

I

In *Miranda*, the Court held that law enforcement officers who take a suspect into custody must inform the suspect of, among other things, his right to have counsel appointed to represent him before and during interrogation:

> "In order fully to apprise a person interrogated of the extent of his rights . . . , it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present. As with the warning of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it." 384 U. S., at 473 (footnotes omitted).

Miranda mandated no specific verbal formulation that police must use, but the Court, speaking through Chief Justice Warren, emphasized repeatedly that the offer of appointed counsel must be "effective and express." *Ibid.*; see also *id.*, at 476 (only a "fully effective equivalent" of the warnings described will pass muster); *id.*, at 444 (requiring "other fully effective means"); *id.*, at 467 (requiring alternative that is "at least as effective"); *id.*, at 490 (stating that "Congress and the States are free to develop their own safeguards for the privilege [against self-incrimination], so long as they are fully as effective as those described above"). A clear and unequivocal offer to provide appointed counsel prior to questioning is, in short, an "absolute prerequisite to interrogation." *Id.*, at 471.

In concluding that the first warning given to respondent Eagan, quoted *ante*, at 198, satisfies the dictates of *Miranda*, the majority makes a mockery of that decision. Eagan was initially advised that he had the right to the presence of counsel before and during questioning. But in the very next

breath, the police informed Eagan that, if he could not afford a lawyer, one would be appointed to represent him only "if and when" he went to court. As the Court of Appeals found, Eagan could easily have concluded from the "if and when" caveat that only "those accused who can afford an attorney have the right to have one present before answering any questions; those who are not so fortunate must wait." 843 F. 2d 1554, 1557 (CA7 1988); see also *United States ex rel. Williams* v. *Twomey*, 467 F. 2d 1248, 1250 (CA7 1972). Eagan was, after all, never told that questioning would be *delayed* until a lawyer was appointed "if and when" Eagan did, in fact, go to court. Thus, the "if and when" caveat may well have had the effect of negating the initial promise that counsel could be present. At best, a suspect like Eagan "would not know . . . whether or not he had a right to the services of a lawyer." *Emler* v. *State*, 286 N. E. 2d 408, 412 (Ind. 1972) (DeBruler, J., dissenting).[1]

In lawyerlike fashion, THE CHIEF JUSTICE parses the initial warnings given Eagan and finds that the most plausible interpretation is that Eagan would not be questioned until a lawyer was appointed when he later appeared in court. What goes wholly overlooked in THE CHIEF JUSTICE's analysis is that the recipients of police warnings are often frightened suspects unlettered in the law, not lawyers or judges or others schooled in interpreting legal or semantic nuance. Such suspects can hardly be expected to interpret, in as facile a manner as THE CHIEF JUSTICE, "the pretzel-like warnings here—intertwining, contradictory, and ambiguous as they

[1] Numerous courts have found inadequate police warnings containing an "if and when" caveat or its equivalent. See *ante*, at 201, n. 2; see also, *e. g.*, *United States* v. *Cassell*, 452 F. 2d 533 (CA7 1971); *United States* v. *Garcia*, 431 F. 2d 134 (CA9 1970); *United States* v. *Oliver*, 421 F. 2d 1034 (CA10 1970); *Reed* v. *State*, 255 Ark. 63, 498 S. W. 2d 877 (1973); *Burns* v. *State*, 486 S. W. 2d 310 (Tex. Crim. App. 1972); *State* v. *Creach*, 77 Wash. 2d 194, 461 P. 2d 329 (1969); *State* v. *Robbins*, 4 N. C. App. 463, 167 S. E. 2d 16 (1969); *People* v. *Bolinski*, 260 Cal. App. 2d 705, 67 Cal. Rptr. 347 (1968); *Brooks* v. *State*, 229 A. 2d 833 (Del. 1967).

are." *Commonwealth* v. *Johnson*, 484 Pa. 349, 356, 399 A. 2d 111, 115 (1979) (citation omitted) (finding inadequate a similar "if and when" caveat). The majority thus refuses to recognize that "[t]he warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has the right to have counsel present." *Miranda*, *supra*, at 473 (footnote omitted).

Even if the typical suspect could draw the inference the majority does—that questioning will not commence until a lawyer is provided at a later court appearance—a warning qualified by an "if and when" caveat still fails to give a suspect any indication of *when* he will be taken to court. Upon hearing the warnings given in this case, a suspect would likely conclude that no lawyer would be provided until trial. In common parlance, "going to court" is synonymous with "going to trial." Furthermore, the negative implication of the caveat is that, if the suspect is never taken to court, he "is not entitled to an attorney at all." 843 F. 2d, at 1557. An unwitting suspect harboring uncertainty on this score is precisely the sort of person who may feel compelled to talk "voluntarily" to the police, without the presence of counsel, in an effort to extricate himself from his predicament:

> "[The suspect] is effectively told that he can talk now or remain in custody—in an alien, friendless, harsh world—for an indeterminate length of time. To the average accused, still hoping at this stage to be home on time for dinner or to make it to work on time, the implication that his choice is to answer questions right away or remain in custody until that nebulous time 'if and when' he goes to court is a coerced choice of the most obvious kind." *Dickerson* v. *State*, 276 N. E. 2d 845, 852 (Ind. 1972) (DeBruler, J., concurring in result) (finding inadequate a warning identical to the one in this case).

See also *United States ex rel. Williams*, *supra*, at 1250; *Schade* v. *State*, 512 P. 2d 907, 920 (Alaska 1973) (Boochever,

J., concurring). That the warning given to Eagan "accurately described the procedure for the appointment of counsel in Indiana," *ante*, at 204, does nothing to mitigate the possibility that he would feel coerced into talking to the police. *Miranda*, it is true, does not require the police to have a "station house lawyer" ready at all times to counsel suspects taken into custody. 384 U. S., at 474. But if a suspect does not understand that a lawyer will be made available within a reasonable period of time after he has been taken into custody and advised of his rights, the suspect may decide to talk to the police *for that reason alone*. The threat of an indefinite deferral of interrogation, in a system like Indiana's, thus constitutes an effective means by which the police can pressure a suspect to speak without the presence of counsel. Sanctioning such police practices simply because the warnings given do not misrepresent state law does nothing more than let the state-law tail wag the federal constitutional dog.[2]

The majority's misreading of *Miranda*—stating that police warnings need only "touc[h] all of the bases required by *Miranda*," *ante*, at 203, that *Miranda* warnings need only be "reasonably 'conve[yed]' " to a suspect, *ibid.* (citation omitted), and that *Miranda* warnings are to be measured not point by point but "in their totality," *ante*, at 205—is exacerbated by its interpretation of *California* v. *Prysock*, 453 U. S. 355 (1981) *(per curiam)*, a decision that squarely supports Eagan's claim in this case. The juvenile suspect in *Prysock* was initially told that he had the right to have a lawyer present before and during questioning. He then was told that he had the right to have his parents present as well. At this point the suspect was informed that a lawyer would be appointed to repre-

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[2] Nothing in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), nor any of our other cases for that matter, supports the notion that the police may indefinitely delay the point at which counsel is appointed. On the contrary, the Court indicated in *Miranda* that the police could detain a person without providing counsel for no more than "a reasonable period of time." *Id.*, at 474.

sent him at no cost if he could not afford one. The California Court of Appeal ruled these warnings insufficient because the suspect was not expressly told of his right to an appointed attorney before and during questioning. This Court reversed, finding that "nothing in the warnings given respondent suggested any limitation on the right to the presence of appointed counsel." *Id.*, at 360–361.

In reaching this result, the *Prysock* Court pointedly distinguished a series of lower court decisions that had found inadequate warnings in which "the reference to the right to appointed counsel was linked with some future point in time." *Id.*, at 360. In *United States* v. *Garcia*, 431 F. 2d 134 (CA9 1970) *(per curiam)*, for example, the suspect had been informed on one occasion that she had the right to appointed counsel "'when she answered any questions,'" and on another occasion that she could "'have an attorney appointed to represent [her] when [she] first appear[ed] before the U. S. Commissioner or the Court.'" Similarly, in *People* v. *Bolinski*, 260 Cal. App. 2d 705, 718, 67 Cal. Rptr. 347, 355 (1968), the suspect was advised that counsel would be appointed "'if he was charged.'" These lower courts had correctly found these warnings defective, the *Prysock* Court explained, because "[i]n both instances the reference to appointed counsel was linked to a future point in time after police interrogation,"[3] and therefore did not clearly advise the suspect of his right to appointed counsel before such in-

[3] The Solicitor General, emphasizing the words "after police interrogation," reasons that *Prysock* "does not condemn warnings that simply link the appointment of counsel to some future event." Brief for United States as *Amicus Curiae* 18. This argument is spurious. Nothing in the warnings given in *Garcia* or *Bolinski* explicitly linked the appointment of counsel to a future event occurring after interrogation, yet the *Prysock* Court still cited those decisions with approval. Indeed, the basic problem with the warnings in those cases (and the warning in this case) is that a suspect *would erroneously believe* that appointment of counsel would be delayed until after interrogation. See *United States* v. *Contreras*, 667 F. 2d 976, 979 (CA11), cert. denied, 459 U. S. 849 (1982).

terrogation. 453 U. S., at 360. The initial, conditional warning given Eagan suffers from precisely the same fatal defect. It is highly disingenuous for the majority to ignore this fact, characterizing *Prysock* as involving only the question whether a particular warning "apprise[d] the accused of his right to have an attorney present if he chose to answer questions." *Ante*, at 205.

It poses no great burden on law enforcement officers to eradicate the confusion stemming from the "if and when" caveat. Deleting the sentence containing the offending language is all that needs to be done. See *United States* v. *Cassell*, 452 F. 2d 533, 541, n. 8 (CA7 1971). Purged of this language, the warning tells the suspect in a straightforward fashion that he has the right to the presence of a lawyer before and during questioning, and that a lawyer will be appointed if he cannot afford one. The suspect is given no reason to believe that the appointment of an attorney may come after interrogation. To the extent one doubts that it is the "if and when" caveat that is the source of the confusion, compare the initial warning given Eagan, quoted *ante*, at 198, and the crystal-clear warning currently used by the FBI, quoted *ante*, at 202, n. 4. The majority's claim that the two warnings are indistinguishable in the message conveyed to a suspect defies belief. I dissent.[4]

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[4] With no analysis whatsoever, the majority also holds that the second set of warnings read to Eagan and included in a waiver form that he signed prior to his second interrogation, quoted *ante*, at 198–199, "plainly comply with *Miranda*." *Ante*, at 205, n. 8. This proposition is subject to dispute given the presence of the "of my own choice" language. See *Sotelo* v. *State*, 342 N. E. 2d 844, 851 (Ind. 1976) (DeBruler, J. concurring). But even assuming the second set of warnings complied with *Miranda*, it does not necessarily follow that Eagan's subsequent waiver of rights was knowing and intelligent. Given "the misapprehension caused by the initial warning," 843 F. 2d 1554, 1557 (CA7 1988), the issue is not whether the second warnings were adequate standing alone, but rather whether under the circumstances the mistaken impression Eagan was initially given was corrected. While various factors might inform this inquiry, such as the passage of

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Not content with disemboweling *Miranda* directly, JUSTICE O'CONNOR seeks to do so indirectly as well, urging that federal courts be barred from considering *Miranda* claims on habeas corpus review. In *Stone* v. *Powell*, 428 U. S. 465 (1976), the Court held that a state prisoner may not seek federal habeas corpus relief on the ground that evidence was obtained in violation of his Fourth Amendment rights if the state courts had provided a full and fair opportunity for litigation of that claim. I joined JUSTICE BRENNAN's dissenting opinion in that case, in which he warned that the majority's rationale "portends substantial evisceration of federal habeas corpus jurisdiction." *Id.*, at 503. Justice Powell, writing for the *Stone* majority, dismissed as "misdirected" the "hyperbole of the dissenting opinion," *id.*, at 494, n. 37, insisting that his opinion was based on considerations unique to the exclusionary rule. Today, however, JUSTICE O'CONNOR seeks to extend *Stone* beyond the Fourth Amendment even though this issue was not raised by petitioner Duckworth below or in his petition for certiorari. Her concurring opinion evinces such a palpable distaste for collateral review of state-court judgments that it can only be viewed as a harbinger of future assaults on federal habeas corpus.[5]

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time, the principal question must be whether the new warnings were sufficiently clear to correct the effect of the earlier, defective warning. As there is little in the record on "the factual circumstances surrounding these events because the state courts did not directly examine this issue," *id.*, at 1558; see also Brief for Respondent 34–38, I agree with the Court of Appeals that "remand for a determination of whether [Eagan] knowingly and intelligently waived his right to the presence of an attorney during the second interrogation" is the appropriate course. 843 F. 2d, at 1558.

[5] JUSTICE O'CONNOR attempts to justify raising this issue by claiming that *Stone* has a jurisdictional component. See *ante*, at 212 (concurring opinion). That is not so. Whatever faint allusions to jurisdiction Justice Powell may have made on page 482 of his *Stone* opinion, he made crystal clear later in the opinion that "[o]ur decision does not mean that the federal court lacks jurisdiction over . . . a [Fourth Amendment] claim." 428 U. S., at

Stone was wrong when it was decided and it is wrong today. I have read and reread the federal habeas corpus statute, but I am unable to find any statement to the effect that certain federal claims are unworthy of collateral protection, or that certain federal claims are more worthy of collateral protection than others. Congress did not delineate "second class" claims when it created federal habeas jurisdiction. *Stone*, *supra*, at 515 (BRENNAN, J., dissenting). On the contrary, Congress deemed *all* federal claims worthy of collateral protection when it extended the writ to any person "in custody pursuant to the judgment of a State Court . . . in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. §2254(a). At a time when plain language is supposed to count for something, JUSTICE O'CONNOR's suggestion that the Court carve out an exception that has no rooting in the text of the habeas statute is difficult to justify.

Under Article III of the Constitution, Congress—not this Court—determines the scope of jurisdiction of the inferior federal courts. Congress is undoubtedly aware that federal habeas review of state criminal convictions might disserve interests of comity and finality and might make the enforcement of state criminal laws more difficult. Congress has determined, however, that the individual's interest in vindicating his federal rights in a federal forum outweighs these concerns. Federal courts, not state courts, thus have the "last say." *Brown* v. *Allen*, 344 U. S. 443, 508 (1953) (opinion of Frankfurter, J.). Regardless of whether we believe

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495, n. 37. Nor could a federal court lack jurisdiction after *Stone*, for it would then be powerless to consider even those Fourth Amendment claims that had not been fully and fairly litigated in the state courts. Furthermore, if *Stone* did in fact have a jurisdictional component, it is hard to understand why Justice Powell, in refusing in a subsequent case to consider whether *Stone* should be applied to Fifth and Sixth Amendment claims, explained that the "question has not been presented in the briefs or arguments." *Brewer* v. *Williams*, 430 U. S. 387, 414 (1977) (concurring opinion).

this congressional scheme accords too little respect to principles of federalism or other values, ours is not the choice to make. See *Stone*, *supra*, at 511 (BRENNAN, J., dissenting) ("[A]s between this Court on certiorari, and federal district courts on habeas, it is for *Congress* to decide what the most efficacious method is for . . . asserting the primacy of federal law") (emphasis in original); see also *Jackson* v. *Virginia*, 443 U. S. 307, 323 (1979); cf. *Mincey* v. *Arizona*, 437 U. S. 385, 402–405 (1978) (MARSHALL, J., concurring).

That JUSTICE O'CONNOR's position is driven by general hostility toward collateral review of state court judgments is apparent. She writes:

> "[L]ower federal courts often sit in 'review' of the judgments of the highest courts of a state judicial system. This situation has always been a flashpoint of tension in the delicate relationship of the federal and state courts, and this exercise of federal power should not be undertaken lightly where no significant federal values are at stake. Perhaps most troubling is the cost to society in the efficient enforcement of its criminal laws. Excluding probative evidence years after trial, when a new trial may be a practical impossibility, will often result in the release of an admittedly guilty individual who may pose a continuing threat to society." *Ante*, at 211 (concurring opinion).

This logic sweeps within its broad compass claims far beyond those based on *Miranda*. Once the specter is raised that federal habeas review may lead to the release of guilty criminals, it is difficult to imagine any non-guilt-related claim that would be worthy of collateral protection. What JUSTICE O'CONNOR ignores is that Congress believed that defendants have rights, often unrelated to guilt or innocence, that are worthy of collateral protection despite the apparent costs to society. Thus, in *Rose* v. *Mitchell*, 443 U. S. 545 (1979), we refused to extend *Stone* to preclude a federal habeas claim of racial discrimination in the selection of a state

grand jury foreperson, even though the defendants' culpability for the murders charged in that case was not disputed. Under JUSTICE O'CONNOR's view that federal habeas review should extend only to guilt-related claims, however, the claim raised in *Rose*, along with claims such as prosecutorial misconduct, double jeopardy, or the right to a speedy trial, could never be cognizable on federal habeas.

It is not only disapprobation for federal habeas review that pervades JUSTICE O'CONNOR's concurring opinion, but also a profound distaste for *Miranda*. How else to explain the remarkable statement that "*no* significant federal values are at stake" when *Miranda* claims are raised in federal habeas corpus proceedings? *Ante*, at 211 (concurring opinion) (emphasis added). But irrespective of one's view of the merits of *Miranda*, the critical point is that *Miranda* is *still good law*. With few exceptions, prosecutors in state courts may not introduce statements taken from a criminal suspect in violation of his *Miranda* rights. If a state trial court permits the introduction of such statements, *federal constitutional error* has been committed. Unless the defendant's conviction is reversed, he is indisputably being held "in violation of the Constitution . . . of the United States." 28 U. S. C. § 2254(a). This is true whether the defendant challenges the introduction of the statements on direct appeal or on collateral review, for the federal violation does not "suddenly vanis[h] after the appellate process has been exhausted." *Stone*, 428 U. S., at 511 (BRENNAN, J., dissenting); see also *id.*, at 536–537 (WHITE, J., dissenting).

Even assuming that *Stone* was correctly decided, and that the question is therefore whether the benefits of the suppression remedy for *Miranda* violations on federal habeas outweigh its costs, I would still reject JUSTICE O'CONNOR's conclusion that "the scales appear . . . to tip further toward finality and repose in this context than in *Stone* itself." *Ante*, at 209 (concurring opinion). In *Stone*, Justice Powell did not rest his "cost" analysis solely on the fact that the exclu-

sionary rule operates, like the *Miranda* requirements, to prevent juries from considering highly probative evidence. Justice Powell's analysis was far subtler than that, for he focused on evidence that was both probative and "typically reliable." 428 U. S., at 490. The erroneous admission of this type of evidence, he explained, does not cast doubt upon the state trial court's "truthfinding process." *Ibid.;* see also *id.*, at 497 (Burger, C. J., concurring). Like evidence that a habeas petitioner challenges under the exclusionary rule—"a pistol, a packet of heroin, counterfeit money, or the body of a murder victim," *ibid.*—a self-incriminatory statement that a habeas petitioner challenges under *Miranda* is ordinarily highly probative. But *unlike* physical evidence seized from a suspect in violation of his Fourth Amendment rights, a statement taken from a suspect in violation of his *Miranda* rights is presumptively unreliable. See *New York* v. *Quarles*, 467 U. S. 649, 664 (1984) (O'CONNOR, J., concurring in judgment in part and dissenting in part) ("When police ask custodial questions without administering the required warnings, *Miranda* quite clearly requires that the answers received be presumed compelled . . ."). Thus, when *Miranda* claims are raised on federal habeas, "the integrity of the factfinding process" of the state trial court is called into question. *Brewer* v. *Williams*, 430 U. S. 387, 414 (1977) (Powell, J., concurring). This is precisely the situation in which collateral review is most appropriate.

JUSTICE O'CONNOR's extension of *Stone* overlooks another difference between claims based on the exclusionary rule and claims based on *Miranda*. According to the *Stone* majority, the primary justification for the exclusionary rule is the deterrence of police misconduct. 428 U. S., at 486; but see *id.*, at 510, and n. 9 (BRENNAN, J., dissenting). By contrast, the rights secured by *Miranda* go to the heart of our accusatorial system—"a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own

mouth." *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961). JUSTICE O'CONNOR recognizes as much, acknowledging that the privilege against self-incrimination reflects the long-standing belief that "the extraction of proof of guilt from the criminal defendant himself is often an adjunct to tyranny and may lead to the conviction of innocent persons." *Ante*, at 209 (concurring opinion). Unlike the exclusionary rule, which purportedly exists solely for deterrence purposes, the *Miranda* requirements thus serve to protect "a criminal suspect's exercise of [a] privilege which is one of the distinctive components of our criminal law." *White* v. *Finkbeiner*, 687 F. 2d 885, 893 (CA7 1982) (declining to extend *Stone* to *Miranda* claims).

JUSTICE O'CONNOR attempts to elide this distinction by advocating that only "nonconstitutional" *Miranda* claims be barred on federal habeas. *Ante*, at 212 (concurring opinion). By this she presumably means those claims that are based on so-called "*voluntary* statements." *Oregon* v. *Elstad*, 470 U. S. 298, 307 (1985) (emphasis in original). I have never accepted the proposition that there is any such a thing as a "nonconstitutional" *Miranda* claim based on "voluntary" statements. The explicit premise of *Miranda* is that, unless a suspect taken into custody is properly advised of his rights, "no statement obtained from the [suspect] can truly be the product of his free choice" as a matter of federal constitutional law. 384 U. S., at 458; see also *id.*, at 445. As Justice Douglas explained: "*Miranda*'s purpose was not promulgation of judicially preferred standards for police interrogation, a function we are quite powerless to perform; the decision enunciated '*constitutional* standards for protection of the privilege' against self-incrimination." *Michigan* v. *Tucker*, 417 U. S. 433, 465–466 (1974) (dissenting opinion), quoting *Miranda*, 384 U. S., at 491. Granted, *Miranda* "is an area of the law filled with technical rules, and the protections it affords defendants might at times be perceived as technicalities," *Jones* v. *Thomas*, 491 U. S. 376, 387 (1989),

but fundamental principles embodied in the Self-Incrimination Clause are at stake whenever a *Miranda* claim is raised. See *Orozco* v. *Texas*, 394 U. S. 324, 326 (1969) ("[T]he use of . . . admissions obtained in the absence of the required warnings [is] a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda*").

Even if it were possible to identify a class of "nonconstitutional" *Miranda* claims, there will be little gained in attempting to extend *Stone* to these claims. It is simply not possible to know in advance which habeas petitioners raising *Miranda* claims will have their statements found "voluntary" and which will not. Federal habeas courts therefore will be obligated to inquire into the nature of each habeas petitioner's *Miranda* claim before deciding whether *Stone* should apply. Moreover, many habeas petitioners will have coupled their *Miranda* claims with traditional involuntariness claims based on the Due Process Clause, thereby making such inquiries inevitable. See *Cardwell* v. *Taylor*, 461 U. S. 571, 573 (1983) *(per curiam)* ("[I]f the statements were involuntary, and therefore obtained in violation of the Fifth Amendment, . . . the federal courts [could] grant relief on collateral review"). Such claims require significant judicial attention because "[d]ifficulties of proof and subtleties of interrogation technique [make] it impossible in most cases for the judiciary to decide with confidence whether the defendant had voluntarily confessed his guilt or whether his testimony had been unconstitutionally compelled." *Quarles*, 467 U. S., at 683 (MARSHALL, J., dissenting). The purported "costs" of collateral review in the exclusionary rule context, such as preventing finality and overburdening the federal courts, see *Stone*, *supra*, at 491, n. 31, thus will still exist even if *Stone* is extended to "nonconstitutional" *Miranda* claims.

In any event, I vehemently oppose the suggestion that it is for the Court to decide, based on our own vague notions of comity, finality, and the intrinsic value of particular constitutional rights, which claims are worthy of collateral federal re-

view and which are not.[6] Congress already engaged in that balancing process when it created habeas review and extended the federal courts' jurisdiction to all claims based on a violation of federal law. The federal courts have been reviewing *Miranda* claims on federal habeas for 23 years, and Congress has never even remotely indicated that they have been remiss in doing so. To the extent JUSTICE O'CONNOR is unhappy with *Miranda*, she should address that decision head on. But an end run through the habeas statute is judicial activism at its worst.

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[6] To paraphrase JUSTICE BRENNAN:

"[A]ll of the 'costs' of applying *[Miranda]* on habeas *should already have been incurred* at the trial or on direct review if the state court had not misapplied federal constitutional principles. As such, these 'costs' were evaluated and deemed to be outweighed when [the *Miranda* requirements were] fashioned. The only proper question on habeas is whether federal courts, acting under congressional directive to have the last say as to enforcement of federal constitutional principles, are to permit the States free enjoyment of the fruits of a conviction which by definition were only obtained through violations of the Constitution as interpreted in *[Miranda]*." *Stone*, 428 U. S., at 512, n. 10 (dissenting opinion) (emphasis in original).

Syllabus

H. J. INC. ET AL. *v.* NORTHWESTERN BELL TELEPHONE CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 87–1252. Argued November 8, 1988—Decided June 26, 1989

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1961–1968, which is Title IX of the Organized Crime Control Act of 1970 (OCCA), imposes criminal and civil liability upon persons who engage in certain "prohibited activities," each of which is defined to include, as a necessary element, proof of a "pattern of racketeering activity," § 1962. "Racketeering activity" means "any act or threat involving" specified state-law crimes, any "act" indictable under specified federal statutes, and certain federal "offenses." § 1961(1). A "pattern" requires "at least two acts of racketeering activity" within a 10-year period. § 1961(5). Petitioners, customers of respondent Northwestern Bell, filed a civil action in the District Court against Northwestern Bell and other respondents, including members of the Minnesota Public Utilities Commission (MPUC)—which is responsible for determining Northwestern Bell's rates—seeking an injunction and treble damages. They raised four separate claims under §§ 1962(a), (b), (c), and (d), based on factual allegations that between 1980 and 1986, Northwestern Bell made various cash and in-kind payments to MPUC members, and thereby influenced them to approve rates for the company in excess of a fair and reasonable amount. The District Court dismissed the complaint, under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief could be granted, on the ground that each of the fraudulent acts alleged was "committed in furtherance of a single scheme to influence MPUC commissioners" rather than multiple illegal schemes. The Court of Appeals affirmed, confirming that under its precedent, a single scheme is insufficient to establish a pattern of racketeering activity.

Held:

1. In order to prove a pattern of racketeering activity, a plaintiff or prosecutor must show at least two racketeering predicates that are related *and* that amount to, or threaten the likelihood of, continued criminal activity. Proof of neither relationship nor continuity requires a showing that the racketeering predicates were committed in furtherance of multiple criminal schemes. Pp. 236–249.

(a) Section 1961(5) states that at least two racketeering predicates committed within a 10-year period are necessary to establish a RICO

pattern, but implies that two acts may not be sufficient. Section 1961(5) thus assumes that there is something to a pattern beyond merely the number of predicates involved. In normal usage, the word "pattern" would also be taken to require not simply a multiplicity of predicates, but rather predicates arranged or ordered by reason of the relationship they bear to each other or to some external organizing principle. The text of RICO fails to identify the forms of relationship or external principles to be used to determine whether predicates fall into a pattern. RICO's legislative history, however, establishes that Congress intended that to prove a "pattern of racketeering activity" a plaintiff or prosecutor must show both "relationship" and "continuity"—that the racketeering predicates are related, and that they either constitute or threaten long-term criminal activity. Pp. 237–239.

(b) Relationship and continuity are two distinct requirements, though their proof will often overlap. RICO's notion of relationship is no more constrained than that used in Title X of OCCA, under which "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U. S. C. § 3575(e). Continuity of racketeering activity likewise may be demonstrated in a variety of ways. Continuity is centrally a temporal concept, and may be either closed- or open-ended. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Otherwise, it must be shown that the predicates establish a *threat* of long-term racketeering activity—for example, because the predicates themselves involve a distinct threat of such activity; because they are part of the regular way of doing business for an ongoing entity such as a criminal association or legitimate business; or because they are a regular means of conducting or participating in an ongoing RICO enterprise. Although proof of multiple criminal schemes may be relevant to this inquiry into continuity, it is not the only way to show continuity. Adopting the Court of Appeals' multiple scheme test would bring a rigidity to the methods of proving a pattern not present in the idea of "continuity" itself, and it would introduce a concept—the "scheme"—that does not appear in RICO's language or legislative history. Pp. 239–243.

(c) Neither RICO's language nor its legislative history supports a rule that a defendant's racketeering activities form a pattern only if they are characteristic of organized crime. No such restriction appears in RICO's text. Nor is there any language suggesting that RICO's scope should be limited to acts of an association rather than an individual acting alone. Moreover, Congress' approach in RICO can be contrasted with

its decision to enact explicit limitations to organized crime in other statutes. *E. g.*, Omnibus Crime Control and Safe Streets Act of 1968, § 601(b). The argument that RICO's broad language should be read restrictively to be congruous with RICO's purpose to eradicate organized crime is rejected: the legislative history shows Congress had no such restriction in mind. Pp. 243–249.

2. The Court of Appeals erred in affirming the District Court's dismissal of petitioners' complaint for failure to allege facts sufficient to demonstrate a "pattern of racketeering activity." Consistent with the allegations in their complaint, petitioners may be able to prove that the multiple predicates alleged satisfy the requirements of continuity and relationship and hence satisfy RICO's pattern of racketeering element. Pp. 249–250.

829 F. 2d 648, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., joined, *post*, p. 251.

Mark Reinhardt argued the cause for petitioners. With him on the briefs were *Susan Bedor* and *John Cochrane*.

John D. French argued the cause for respondents. With him on the brief were *John F. Beukema*, *James L. Volling*, and *Stephen T. Refsell*.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried*, *Acting Assistant Attorney General Richard*, *Deputy Solicitor General Bryson*, *Richard G. Taranto*, *Joel M. Gershowitz*, and *Frank J. Marine*; and for the States of Arizona et al. by *Robert K. Corbin*, Attorney General of Arizona, *John K. Van de Kamp*, Attorney General of California, *John J. Kelly*, Chief State's Attorney of Connecticut, *Jim Jones*, Attorney General of Idaho, *Frank J. Kelley*, Attorney General of Michigan, *W. Cary Edwards*, Attorney General of New Jersey, *Hal Stratton*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, and *Jean A. Benoy*, Senior Deputy Attorney General, *Dave Frohnmayer*, Attorney General of Oregon, *Jim Mattox*, Attorney General of Texas, *Kenneth O. Eikenberry*, Attorney General of Washington, *Charlie Brown*, Attorney General of West Virginia, *Donald J. Hanaway*, Attorney General of Wisconsin, and *Joseph B. Meyer*, Attorney General of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Robert*

JUSTICE BRENNAN delivered the opinion of the Court.

The Racketeer Influenced and Corrupt Organizations Act (RICO or Act), Pub. L. 91–452, Title IX, 84 Stat. 941, as amended, 18 U. S. C. §§ 1961–1968 (1982 ed. and Supp. V), imposes criminal and civil liability upon those who engage in certain "prohibited activities." Each prohibited activity is defined in 18 U. S. C. § 1962 to include, as one necessary element, proof either of "a pattern of racketeering activity" or of "collection of an unlawful debt." "Racketeering activity" is defined in RICO to mean "any act or threat involving" specified state-law crimes, any "act" indictable under various specified federal statutes, and certain federal "offenses," 18 U. S. C. § 1961(1) (1982 ed., Supp. V); but of the term "pattern" the statute says only that it "requires at least two acts of racketeering activity" within a 10-year period, 18 U. S. C. § 1961(5). We are called upon in this civil case to consider what conduct meets RICO's pattern requirement.

I

RICO renders criminally and civilly liable "any person" who uses or invests income derived "from a pattern of racketeering activity" to acquire an interest in or to operate an enterprise engaged in interstate commerce, § 1962(a); who acquires or maintains an interest in or control of such an enterprise "through a pattern of racketeering activity," § 1962(b); who, being employed by or associated with such an enterprise, conducts or participates in the conduct of its af-

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M. Weinberg and *Laurence Gold;* for the American Institute of Certified Public Accountants by *Philip A. Lacovara, Geoffrey F. Aronow,* and *Louis A. Craco;* for the National Association of Manufacturers by *Stephen M. Shapiro, Andrew L. Frey, Kenneth S. Geller, Mark I. Levy, Jan S. Amundson,* and *Quentin Riegel;* and for the Washington Legal Foundation by *Daniel J. Popeo, Paul D. Kamenar,* and *Vicki S. Marani.*

Briefs of *amici curiae* were filed for the Chamber of Commerce of the United States by *Stephen A. Bokat, Robin S. Conrad,* and *Lynn M. Smelkinson;* and for Trial Lawyers for Public Justice by *Robert M. Hausman.*

fairs "through a pattern of racketeering activity," § 1962(c); or, finally, who conspires to violate the first three subsections of § 1962, § 1962(d). RICO provides for drastic remedies: conviction for a violation of RICO carries severe criminal penalties and forfeiture of illegal proceeds, 18 U. S. C. § 1963 (1982 ed., Supp. V); and a person found in a private civil action to have violated RICO is liable for treble damages, costs, and attorney's fees, 18 U. S. C. § 1964(c).

Petitioners, customers of respondent Northwestern Bell Telephone Co., filed this putative class action in 1986 in the District Court for the District of Minnesota. Petitioners alleged violations of §§ 1962(a), (b), (c), and (d) by Northwestern Bell and the other respondents—some of the telephone company's officers and employees, various members of the Minnesota Public Utilities Commission (MPUC), and other unnamed individuals and corporations—and sought an injunction and treble damages under RICO's civil liability provisions, §§ 1964(a) and (c).

The MPUC is the state body responsible for determining the rates that Northwestern Bell may charge. Petitioners' five-count complaint alleged that between 1980 and 1986 Northwestern Bell sought to influence members of the MPUC in the performance of their duties—and in fact caused them to approve rates for the company in excess of a fair and reasonable amount—by making cash payments to commissioners, negotiating with them regarding future employment, and paying for parties and meals, for tickets to sporting events and the like, and for airline tickets. Based upon these factual allegations, petitioners alleged in their first count a pendent state-law claim, asserting that Northwestern Bell violated the Minnesota bribery statute, Minn. Stat. § 609.42 (1988), as well as state common law prohibiting bribery. They also raised four separate claims under § 1962 of RICO. Count II alleged that, in violation of § 1962(a), Northwestern Bell derived income from a pattern of racketeering activity involving predicate acts of bribery and used

this income to engage in its business as an interstate "enterprise." Count III claimed a violation of § 1962(b), in that, through this same pattern of racketeering activity, respondents acquired an interest in or control of the MPUC, which was also an interstate "enterprise." In Count IV, petitioners asserted that respondents participated in the conduct and affairs of the MPUC through this pattern of racketeering activity, contrary to § 1962(c). Finally, Count V alleged that respondents conspired together to violate §§ 1962(a), (b), and (c), thereby contravening § 1962(d).

The District Court granted respondents' Federal Rule of Civil Procedure 12(b)(6) motion, dismissing the complaint for failure to state a claim upon which relief could be granted. 648 F. Supp. 419 (Minn. 1986). The court found that "[e]ach of the fraudulent acts alleged by [petitioners] was committed in furtherance of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers." *Id.*, at 425. It held that dismissal was therefore mandated by the Court of Appeals for the Eighth Circuit's decision in *Superior Oil Co.* v. *Fulmer*, 785 F. 2d 252 (1986), which the District Court interpreted as adopting an "extremely restrictive" test for a pattern of racketeering activity that required proof of "multiple illegal schemes." 648 F. Supp., at 425.[1] The Court of Appeals for the Eighth Circuit affirmed the dismissal of petitioners' complaint, confirming that under Eighth Circuit precedent "[a] single fraudulent effort or scheme is insufficient" to establish a pattern of racketeer-

[1] The District Court also held that, because the MPUC had conclusively determined that Northwestern Bell's allegedly excessive rates were reasonable, the "filed rate" doctrine provided an independent ground for dismissal of the complaint. 648 F. Supp., at 428–429. The Court of Appeals did not consider this issue, and we have no occasion to address it here. Nor do we express any opinion as to the District Court's view that Count II was defective because it failed to "allege the existence of an 'enterprise' separate and distinct from the 'person' identified," as the court held was required by § 1962(a). *Id.*, at 428.

ing activity, 829 F. 2d 648, 650 (1987), and agreeing with the District Court that petitioners' complaint alleged only a single scheme, *ibid.* Two members of the panel suggested in separate concurrences, however, that the Court of Appeals should reconsider its test for a RICO pattern. *Id.*, at 650 (McMillian, J.); *id.*, at 651 (J. Gibson, J.). Most Courts of Appeals have rejected the Eighth Circuit's interpretation of RICO's pattern concept to require an allegation and proof of multiple schemes,[2] and we granted certiorari to resolve this conflict. 485 U. S. 958 (1988). We now reverse.

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[2] See *Roeder* v. *Alpha Industries, Inc.*, 814 F. 2d 22, 30–31 (CA1 1987) (rejecting multiple scheme requirement; sufficient that predicates relate to one another and threaten to be more than an isolated occurrence); *United States* v. *Indelicato*, 865 F. 2d 1370, 1381–1384 (CA2 1989) (en banc) (rejecting multiple scheme requirement; two or more interrelated acts with showing of continuity or threat of continuity sufficient); *Barticheck* v. *Fidelity Union Bank/First National State*, 832 F. 2d 36, 39–40 (CA3 1987) (rejecting multiple scheme requirement; adopting case-by-case multifactor test); *International Data Bank, Ltd.* v. *Zepkin*, 812 F. 2d 149, 154–155 (CA4 1987) (rejecting any mechanical test; single *limited* scheme insufficient, but a large continuous scheme should not escape RICO's enhanced penalties); *R. A. G. S. Couture, Inc.* v. *Hyatt*, 774 F. 2d 1350, 1355 (CA5 1985) (two related predicate acts may be sufficient); *United States* v. *Jennings*, 842 F. 2d 159, 163 (CA6 1988) (two predicate acts potentially enough); *Morgan* v. *Bank of Waukegan*, 804 F. 2d 970, 975–976 (CA7 1986) (refusing to accept multiple scheme requirement as the general rule; adopting multifactor test, but requiring that predicates constitute "separate transactions"); *Sun Savings and Loan Assn.* v. *Dierdorff*, 825 F. 2d 187, 193 (CA9 1987) (rejecting multiple scheme test; requiring two predicates, separated in time, which are not isolated events); *Torwest DBC, Inc.* v. *Dick*, 810 F. 2d 925, 928–929 (CA10 1987) (holding single scheme from which no threat of continuing criminal activity may be inferred insufficient); *Bank of America National Trust & Savings Assn.* v. *Touche Ross & Co.*, 782 F. 2d 966, 971 (CA11 1986) (rejecting multiple scheme test; requiring that predicates be interrelated and not isolated events); *Yellow Bus Lines, Inc.* v. *Drivers, Chauffeurs & Helpers Local Union 639*, 268 U. S. App. D. C. 103, 110, 839 F. 2d 782, 789 (1988) (requiring related acts that are not isolated events).

II

In *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479 (1985), this Court rejected a restrictive interpretation of § 1964(c) that would have made it a condition for maintaining a civil RICO action both that the defendant had already been convicted of a predicate racketeering act or of a RICO violation, and that plaintiff show a special racketeering injury. In doing so, we acknowledged concern in some quarters over civil RICO's use against "legitimate" businesses, as well as "mobsters and organized criminals"—a concern that had frankly led to the Court of Appeals' interpretation of § 1964(c) in *Sedima*, see *id.*, at 499–500. But we suggested that RICO's expansive uses "appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'pattern'"—both factors that apply to criminal as well as civil applications of the Act. *Id.*, at 500; see also *id.*, at 501–502 (MARSHALL, J., dissenting). Congress has done nothing in the interim further to illuminate RICO's key requirement of a pattern of racketeering; and as the plethora of different views expressed by the Courts of Appeals since *Sedima* demonstrates, see n. 2, *supra*, developing a meaningful concept of "pattern" within the existing statutory framework has proved to be no easy task.

It is, nevertheless, a task we must undertake in order to decide this case. Our guides in the endeavor must be the text of the statute and its legislative history. We find no support in those sources for the proposition, espoused by the Court of Appeals for the Eighth Circuit in this case, that predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes. Nor can we agree with those courts that have suggested that a pattern is established merely by proving two predicate acts, see, *e. g.*, *United States* v. *Jennings*, 842 F. 2d 159, 163 (CA6 1988), or with *amici* in this case who argue that the word "pattern" re-

fers only to predicates that are indicative of a perpetrator involved in organized crime or its functional equivalent. In our view, Congress had a more natural and commonsense approach to RICO's pattern element in mind, intending a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity.

A

We begin, of course, with RICO's text, in which Congress followed a "pattern [of] utilizing terms and concepts of breadth." *Russello* v. *United States*, 464 U. S. 16, 21 (1983). As we remarked in *Sedima*, *supra*, at 496, n. 14, the section of the statute headed "definitions," 18 U. S. C. § 1961 (1982 ed. and Supp. V), does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern. Unlike other provisions in § 1961 that tell us what various concepts used in the Act "mean," 18 U. S. C. § 1961(5) says of the phrase "pattern of racketeering activity" only that it "requires at least two acts of racketeering activity, one of which occurred after [October 15, 1970,] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." It thus places an outer limit on the concept of a pattern of racketeering activity that is broad indeed.

Section 1961(5) does indicate that Congress envisioned circumstances in which no more than two predicates would be necessary to establish a pattern of racketeering—otherwise it would have drawn a narrower boundary to RICO liability, requiring proof of a greater number of predicates. But, at the same time, the statement that a pattern "requires at least" two predicates implies "that while two acts are necessary, they may not be sufficient." *Sedima*, 473 U. S., at

496, n. 14; *id.*, at 527 (Powell, J., dissenting). Section 1961 (5) concerns only the minimum *number* of predicates necessary to establish a pattern; and it assumes that there is something to a RICO pattern *beyond* simply the number of predicate acts involved. The legislative history bears out this interpretation, for the principal sponsor of the Senate bill expressly indicated that "proof of two acts of racketeering activity, without more, does not establish a pattern." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). Section § 1961(5) does not identify, though, these additional prerequisites for establishing the existence of a RICO pattern.

In addition to § 1961(5), there is the key phrase "pattern of racketeering activity" itself, from § 1962, and we must "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U. S. 1, 9 (1962). In normal usage, the word "pattern" here would be taken to require more than just a multiplicity of racketeering predicates. A "pattern" is an "arrangement or order of things or activity," 11 Oxford English Dictionary 357 (2d ed. 1989), and the mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order. It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them "ordered" or "arranged." The text of RICO conspicuously fails anywhere to identify, however, forms of relationship or external principles to be used in determining whether racketeering activity falls into a pattern for purposes of the Act.

It is reasonable to infer, from this absence of any textual identification of sorts of pattern that would satisfy § 1962's requirement, in combination with the very relaxed limits to the pattern concept fixed in § 1961(5), that Congress intended to take a flexible approach, and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set. For any more specific guidance as

to the meaning of "pattern," we must look past the text to RICO's legislative history, as we have done in prior cases construing the Act. See *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S., at 486–490 (majority opinion); *id.*, at, 510–519 (MARSHALL, J., dissenting); *id.*, at, 524–527 (Powell, J., dissenting); *Russello* v. *United States*, *supra*, at 26–29; *United States* v. *Turkette*, 452 U. S. 576, 586–587, 589–593 (1981).

The legislative history, which we discussed in *Sedima*, *supra*, at 496, n. 14, shows that Congress indeed had a fairly flexible concept of a pattern in mind. A pattern is not formed by "sporadic activity," S. Rep. No. 91–617, p. 158 (1969), and a person cannot "be subjected to the sanctions of title IX simply for committing two widely separated and isolated criminal offenses," 116 Cong. Rec. 18940 (1970) (Sen. McClellan). Instead, "[t]he term 'pattern' itself requires the showing of a relationship" between the predicates, *ibid.*, and of "'the threat of continuing activity,'" *ibid.*, quoting S. Rep. No. 91–617, *supra*, at 158. "It is this factor of *continuity plus relationship* which combines to produce a pattern." 116 Cong. Rec., at 18940 (emphasis added). RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.

B

For analytic purposes these two constituents of RICO's pattern requirement must be stated separately, though in practice their proof will often overlap. The element of relatedness is the easier to define, for we may take guidance from a provision elsewhere in the Organized Crime Control Act of 1970 (OCCA), Pub. L. 91–452, 84 Stat. 922, of which RICO formed Title IX. OCCA included as Title X the Dangerous Special Offender Sentencing Act, 18 U. S. C. §3575 *et seq.* (now partially repealed). Title X provided for enhanced sen-

tences where, among other things, the defendant had committed a prior felony as part of a pattern of criminal conduct or in furtherance of a conspiracy to engage in a pattern of criminal conduct. As we noted in *Sedima*, *supra*, at 496, n. 14, Congress defined Title X's pattern requirement solely in terms of the *relationship* of the defendant's criminal acts one to another: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." § 3575(e). We have no reason to suppose that Congress had in mind for RICO's pattern of racketeering component any more constrained a notion of the relationships between predicates that would suffice.

RICO's legislative history tells us, however, that the relatedness of racketeering activities is not alone enough to satisfy § 1962's pattern element. To establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity. As to this continuity requirement, § 3575(e) is of no assistance. It is this aspect of RICO's pattern element that has spawned the "multiple scheme" test adopted by some lower courts, including the Court of Appeals in this case. See 829 F. 2d, at 650 ("In order to demonstrate the necessary continuity appellants must allege that Northwestern Bell 'had engaged in similar endeavors in the past or that [it was] engaged in other criminal activities.' . . . A single fraudulent effort or scheme is insufficient"). But although proof that a RICO defendant has been involved in multiple criminal schemes would certainly be highly relevant to the inquiry into the continuity of the defendant's racketeering activity, it is implausible to suppose that Congress thought continuity might be shown *only* by proof of multiple schemes. The Eighth Circuit's test brings a rigidity to the available methods of proving a pat-

tern that simply is not present in the idea of "continuity" itself; and it does so, moreover, by introducing a concept—the "scheme"—that appears nowhere in the language or legislative history of the Act.[3] We adopt a less inflexible approach that seems to us to derive from a commonsense, everyday understanding of RICO's language and Congress' gloss on it. What a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat, *simpliciter*. This may be done in a variety of ways, thus making it difficult to formulate in the abstract any general test for continuity. We can, however, begin to delineate the requirement.

"Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. See *Barticheck* v. *Fidelity Union Bank/First National State*, 832 F. 2d 36, 39 (CA3 1987). It

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[3] Nor does the multiple scheme approach to identifying continuing criminal conduct have the advantage of lessening the uncertainty inherent in RICO's pattern component, for "'scheme' is hardly a self-defining term." *Barticheck* v. *Fidelity Union Bank/First National State*, 832 F. 2d, at 39. A "scheme" is in the eye of the beholder, since whether a scheme exists depends on the level of generality at which criminal activity is viewed. For example, petitioners' allegation that Northwestern Bell attempted to subvert public utility commissioners who would be voting on the company's rates might be described as a single scheme to obtain a favorable rate, or as multiple schemes to obtain favorable votes from individual commissioners on the ratemaking decision. Similarly, though interference with ratemaking spanning several ratemaking decisions might be thought of as a single scheme with advantageous rates as its objective, each ratemaking decision might equally plausibly be regarded as distinct and the object of its own "scheme." There is no obviously "correct" level of generality for courts to use in describing the criminal activity alleged in RICO litigation. Because of this problem of generalizability, the Eighth Circuit's "scheme" concept is highly elastic. Though the definitional problems that arise in interpreting RICO's pattern requirement inevitably lead to uncertainty regarding the statute's scope—whatever approach is adopted—we prefer to confront these problems directly, not "by introducing a new and perhaps more amorphous concept into the analysis" that has no basis in text or legislative history. *Ibid.*

is, in either case, centrally a temporal concept—and particularly so in the RICO context, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated. See S. Rep. No. 91–617, at 158.

Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case. Without making any claim to cover the field of possibilities—preferring to deal with this issue in the context of concrete factual situations presented for decision—we offer some examples of how this element might be satisfied. A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently estab-

lished where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes. Such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime." The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."[4]

The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists. The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope.

III

Various *amici* urge that RICO's pattern element should be interpreted more narrowly than as requiring relationship and continuity in the senses outlined above, so that a defendant's racketeering activities form a pattern only if they are characteristic either of organized crime in the traditional sense, or of an organized-crime-type perpetrator, that is, of an association dedicated to the repeated commission of criminal of-

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[4] Insofar as the concurrence seems to suggest, *post*, at 253–254, that very short periods of criminal activity that do *not* in any way carry a threat of continued criminal activity constitute "obvious racketeer[ing]" to which Congress intended RICO, with its enhanced penalties, to apply, we have concluded that it is mistaken, and that when Congress said predicates must demonstrate "continuity" before they may form a RICO pattern, it expressed an intent that RICO reach activities that amount to or threaten long-term criminal activity.

fenses.[5] Like the Court of Appeals' multiple scheme rule, however, the argument for reading an organized crime limitation into RICO's pattern concept, whatever the merits and demerits of such a limitation as an initial legislative matter, finds no support in the Act's text, and is at odds with the tenor of its legislative history.

One evident textual problem with the suggestion that predicates form a RICO pattern only if they are indicative of an organized crime perpetrator—in either a traditional or functional sense—is that it would seem to require proof that the racketeering acts were the work of an association or group, rather than of an individual acting alone. RICO's language supplies no grounds to believe that Congress meant to impose such a limit on the Act's scope. A second indication from the text that Congress intended no organized crime limitation is that no such restriction is explicitly stated. In those titles of OCCA where Congress did intend to limit the new law's application to the context of organized crime, it said so. Thus Title V, authorizing the witness protection program, stated that the Attorney General may provide for the security of witnesses "in legal proceedings against any person alleged to have participated in an organized criminal activity." 84 Stat. 933, note preceding 18 U. S. C. § 3481

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[5] See Brief for Washington Legal Foundation as *Amicus Curiae* 11, 15–16; Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 17. See also Briefs for National Association of Manufacturers, and for American Institute of Certified Public Accountants, as *Amici Curiae*.

Lower courts have rejected various forms of the argument that RICO should be limited in scope, through one or another of its terms or concepts, to organized crime. See, *e. g.*, *Sedima, S. P. R. L.* v. *Imrex Co.*, 741 F. 2d 482, 492, n. 32 (CA2 1984) (citing cases), rev'd, 473 U. S. 479 (1985); *Moss* v. *Morgan Stanley Inc.*, 719 F. 2d 5, 21 (CA2 1983) ("The language of the statute . . . does not premise a RICO violation on proof or allegations of any connection with organized crime"), cert. denied *sub nom. Moss* v. *Newman*, 465 U. S. 1025 (1984); *Schacht* v. *Brown*, 711 F. 2d 1343, 1353–1356 (CA7 1983).

(since repealed). And Title VI permitted the deposition of a witness to preserve testimony for a legal proceeding, upon motion by the Attorney General certifying that "the legal proceeding is against a person who is believed to have participated in an organized criminal activity." 18 U. S. C. § 3503(a). Moreover, Congress' approach in RICO can be contrasted with its decision to enact explicit limitations to organized crime in other statutes. *E. g.*, Omnibus Crime Control and Safe Streets Act of 1968, § 601(b), Pub. L. 90–351, 82 Stat. 209 (defining "organized crime" as "the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations"). Congress' decision not explicitly to limit RICO's broad terms strongly implies that Congress had in mind no such narrow and fixed idea of what constitutes a pattern as that suggested by *amici* here.

It is argued, nonetheless, that Congress' purpose in enacting RICO, as revealed in the Act's title, in OCCA's preamble, 84 Stat. 923 (Congress seeking "the eradication of organized crime in the United States"), and in the legislative history, was to combat organized crime; and that RICO's broad language should be read narrowly so that the Act's scope is coextensive with this purpose. We cannot accept this argument for a narrowing construction of the Act's expansive terms.

To be sure, Congress focused on, and the examples used in the debates and reports to illustrate the Act's operation concern, the predations of mobsters. Organized crime was without a doubt Congress' major target, as we have recognized elsewhere. See *Russello*, 464 U. S., at 26; *Turkette*, 452 U. S., at 591. But the definition of a "pattern of criminal conduct" in Title X of OCCA in terms only of the relationship between criminal acts, see *supra*, at 240, shows that Con-

gress was quite capable of conceiving of "pattern" as a flexible concept not dependent on tying predicates to the major objective of the law, which for Title X as for Title IX was the eradication of organized crime. See 84 Stat. 923. Title X's definition of "pattern" should thus create a good deal of skepticism about any claim that, despite the capacious language it used, Congress must have intended the RICO pattern element to pick out only racketeering activities with an organized crime nexus. And, indeed, the legislative history shows that Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime.

Opponents criticized OCCA precisely because it failed to limit the statute's reach to organized crime. See, *e. g.*, S. Rep. No. 91–617, at 215 (Sens. Hart and Kennedy complaining that the OCCA bill "goes beyond organized criminal activity"). In response, the statute's sponsors made evident that the omission of this limit was no accident, but a reflection of OCCA's intended breadth. Senator McClellan was most plain in this respect:

> "The danger posed by organized crime-type offenses to our society has, of course, provided the occasion for our examination of the working of our system of criminal justice. But should it follow . . . that any proposals for action stemming from that examination be limited to organized crime?
>
> "[T]his line of analysis . . . is seriously defective in several regards. Initially, it confuses the occasion for reexamining an aspect of our system of criminal justice with the proper scope of any new principle or lesson derived from that reexamination.
>
> . . . . .
>
> "In addition, the objection confuses the role of the Congress with the role of a court. Out of a proper sense of their limited lawmaking function, courts ought to confine their judgments to the facts of the cases before

them. But the Congress in fulfilling its proper legislative role must examine not only individual instances, but whole problems. In that connection, it has a duty not to engage in piecemeal legislation. Whatever the limited occasion for the identification of a problem, the Congress has the duty of enacting a principled solution to the entire problem. Comprehensive solutions to identified problems must be translated into well integrated legislative programs.

"The objection, moreover, has practical as well as theoretical defects. Even as to the titles of [the OCCA bill] needed primarily in organized crime cases, there are very real limits on the degree to which such provisions can be strictly confined to organized crime cases. . . . On the other hand, each title . . . which is justified primarily in organized crime prosecutions has been confined to such cases to the maximum degree possible, while preserving the ability to administer the act and its effectiveness as a law enforcement tool." 116 Cong. Rec. 18913–18914 (1970).

Representative Poff, another sponsor of the legislation, also answered critics who complained that a definition of "organized crime" was needed:

> "It is true that there is no organized crime definition in many parts of the bill. This is, in part, because it is probably impossible precisely and definitively to define organized crime. But if it were possible, I ask my friend, would he not be the first to object that in criminal law we establish procedures which would be applicable only to a certain type of defendant?" *Id.*, at 35204.

See also *id.*, at 35344 (Rep. Poff) ("organized crime" simply "a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances," not a precise concept).

The thrust of these explanations seems to us reasonably clear. The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime. In Title IX, Congress picked out as key to RICO's application broad concepts that might fairly indicate an organized crime connection, but that it fully realized do not either individually or together provide anything approaching a perfect fit with "organized crime." See, *e. g.*, *id.*, at 18940 (Sen. McClellan) ("It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well").

It seems, moreover, highly unlikely that Congress would have intended the pattern requirement to be interpreted by reference to a concept that it had itself rejected for inclusion in the text of RICO at least in part because "it is probably impossible precisely and definitively to define." *Id.*, at 35204 (Rep. Poff). Congress realized that the stereotypical view of organized crime as consisting in a circumscribed set of illegal activities, such as gambling and prostitution—a view expressed in the definition included in the Omnibus Crime Control and Safe Streets Act, and repeated in the OCCA preamble—was no longer satisfactory because criminal activity had expanded into legitimate enterprises. See *United States* v. *Turkette*, 452 U. S., at 590–591. Title 18 U. S. C. § 1961(1) (1982 ed., Supp. V), with its very generous definition of "racketeering activity," acknowledges the breakdown of the traditional conception of organized crime, and responds to a new situation in which persons engaged in long-term criminal activity often operate *wholly* within legitimate enterprises. Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators

operating in many different ways. It would be counterproductive and a mismeasure of congressional intent now to adopt a narrow construction of the statute's pattern element that would require proof of an organized crime nexus.

As this Court stressed in *Sedima*, in rejecting a pinched construction of RICO's provision for a private civil action, adopted by a lower court because it perceived that RICO's use against non-organized-crime defendants was an "abuse" of the Act, "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises." 473 U. S., at 499. Legitimate businesses "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences"; and, as a result, § 1964(c)'s use "against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued." *Ibid.* If plaintiffs' ability to use RICO against businesses engaged in a pattern of criminal acts is a defect, we said, it is one "inherent in the statute as written," and hence beyond our power to correct. *Ibid.* RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court. There is no more room in RICO's "self-consciously expansive language and overall approach" for the imposition of an organized crime limitation than for the "amorphous 'racketeering injury' requirement" we rejected in *Sedima*, see *id.*, at 495, 498. We thus decline the invitation to invent a rule that RICO's pattern of racketeering concept requires an allegation and proof of an organized crime nexus.

IV

We turn now to the application of our analysis of RICO's pattern requirement. Because respondents prevailed on a motion under Federal Rule of Civil Procedure 12(b)(6), we read the facts alleged in the complaint in the light most favorable to petitioners. And we may only affirm the dismissal of the complaint if "it is clear that no relief could be granted

under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spalding*, 467 U. S. 69, 73 (1984).

Petitioners' complaint alleges that at different times over the course of at least a 6-year period the noncommissioner respondents gave five members of the MPUC numerous bribes, in several different forms, with the objective—in which they were allegedly successful—of causing these commissioners to approve unfair and unreasonable rates for Northwestern Bell. RICO defines bribery as a "racketeering activity," 18 U. S. C. § 1961(1), so petitioners have alleged multiple predicate acts.

Under the analysis we have set forth above, and consistent with the allegations in their complaint, petitioners may be able to prove that the multiple predicates alleged constitute "a pattern of racketeering activity," in that they satisfy the requirements of relationship and continuity. The acts of bribery alleged are said to be related by a common purpose, to influence commissioners in carrying out their duties in order to win approval of unfairly and unreasonably high rates for Northwestern Bell. Furthermore, petitioners claim that the racketeering predicates occurred with some frequency over at least a 6-year period, which may be sufficient to satisfy the continuity requirement. Alternatively, a threat of continuity of racketeering activity might be established at trial by showing that the alleged bribes were a regular way of conducting Northwestern Bell's ongoing business, or a regular way of conducting or participating in the conduct of the alleged and ongoing RICO enterprise, the MPUC.

The Court of Appeals thus erred in affirming the District Court's dismissal of petitioners' complaint for failure to plead "a pattern of racketeering activity." The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY join, concurring in the judgment.

Four Terms ago, in *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479 (1985), we gave lower courts the following four clues concerning the meaning of the enigmatic term "pattern of racketeering activity" in the Racketeer Influenced and Corrupt Organizations Act (RICO or Act), Pub. L. 91–452, Title IX, 84 Stat. 941, as amended, 18 U. S. C. §§ 1961–1968 (1982 ed. and Supp. V). First, we stated that the statutory definition of the term in 18 U. S. C. § 1961(5) implies "that while two acts are necessary, they may not be sufficient." *Sedima*, 473 U. S., at 496, n. 14. Second, we pointed out that "two isolated acts of racketeering activity," "sporadic activity," and "proof of two acts of racketeering activity, without more" would not be enough to constitute a pattern. *Ibid.* Third, we quoted a snippet from the legislative history stating "[i]t is this factor of *continuity plus relationship* which combines to produce a pattern." *Ibid.* Finally, we directed lower courts' attention to 18 U. S. C. § 3575(e), which defined the term "pattern of conduct which was criminal" used in a different title of the same Act, and instructed them that "[t]his language may be useful in interpreting other sections of the Act," 473 U. S., at 496, n. 14. Thus enlightened, the District Courts and Courts of Appeals set out "to develop a meaningful concept of 'pattern,'" *id.*, at 500, and promptly produced the widest and most persistent Circuit split on an issue of federal law in recent memory, see, *e. g.*, *ante*, at 235, n. 2. Today, four years and countless millions in damages and attorney's fees later (not to mention prison sentences under the criminal provisions of RICO), the Court does little more than repromulgate those hints as to what RICO means, though with the caveat that Congress intended that they be applied using a "flexible approach." *Ante*, at 238.

Elevating to the level of statutory text a phrase taken from the legislative history, the Court counsels the lower courts: "'continuity plus relationship.'" *Ante*, at 239 (emphasis deleted). This seems to me about as helpful to the conduct of their affairs as "life is a fountain." Of the two parts of this talismanic phrase, the relatedness requirement is said to be the "easier to define," *ibid.*, yet here is the Court's definition, *in toto:* "'[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events,'" *ante*, at 240. This definition has the feel of being solidly rooted in law, since it is a direct quotation of 18 U. S. C. § 3575(e). Unfortunately, if normal (and sensible) rules of statutory construction were followed, the existence of § 3575(e)—which is the definition contained in another title of the Act that was explicitly *not* rendered applicable to RICO—suggests that *whatever* "pattern" might mean in RICO, it assuredly *does not* mean that. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U. S. 16, 23 (1983). But that does not really matter, since § 3575(e) is utterly uninformative anyway. It hardly closes in on the target to know that "relatedness" refers to acts that are related by "purposes, results, participants, victims, . . . methods of commission, *or* [just in case that is not vague enough] *otherwise*." Is the fact that the victims of both predicate acts were women enough? Or that both acts had the purpose of enriching the defendant? Or that the different coparticipants of the defendant in both acts were his coemployees? I doubt that the lower courts will find the Court's instructions much more helpful than telling them to look for a "pattern"—which is what the statute already says.

The Court finds "continuity" more difficult to define precisely. "Continuity," it says, "is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Ante*, at 241. I have no idea what this concept of a "closed period of repeated conduct" means. Virtually all allegations of racketeering activity, in both civil and criminal suits, will relate to past periods that are "closed" (unless one expects plaintiff or the prosecutor to establish that the defendant not only committed the crimes he did, but is still committing them), and all of them *must* relate to conduct that is "repeated," because of RICO's multiple-act requirement. I had thought, initially, that the Court was seeking to draw a distinction between, on the one hand, past repeated conduct (multiple racketeering acts) that is "closed-ended" in the sense that, in its totality, it constitutes only one criminal "scheme" or "episode"—which would not fall within RICO unless in its nature (for one or more of the reasons later described by the Court, see *ante*, at 242–243) it threatened future criminal endeavors as well—and, on the other hand, past repeated conduct (multiple racketeering acts) that constitutes several separate schemes—which is alone enough to invoke RICO. But of course that cannot be what it means, since the Court rejects the "multiple scheme" concept, not merely as the *exclusive* touchstone of RICO liability, see *ante*, at 240, but in all its applications, since it "introduc[es] a concept . . . that appears nowhere in the language or legislative history of the Act," *ante*, at 241, and is so vague and "amorphous" as to exist only "in the eye of the beholder," *ante*, at 241, n. 3. Moreover, the Court tells us that predicate acts extending, not over a "substantial period of time," but only over a "few weeks or months and threatening no future criminal conduct" do not satisfy the continuity requirement. *Ante*, at 242. Since the Court has rejected the concept of separate criminal "schemes" or "episodes" as a criterion of "threatening future criminal conduct,"

I think it must be saying that at least a few months of racketeering activity (and who knows how much more?) is generally for free, as far as RICO is concerned. The "closed period" concept is a sort of safe harbor for racketeering activity that does not last *too* long, no matter how many different crimes and different schemes are involved, so long as it does not otherwise "establish a threat of continued racketeering activity," *ibid.* A gang of hoodlums that commits one act of extortion on Monday in New York, a second in Chicago on Tuesday, a third in San Francisco on Wednesday, and so on through an entire week, and then finally and completely disbands, cannot be reached under RICO. I am sure that is not what the statute intends, but I cannot imagine what else the Court's murky discussion can possibly mean.

Of course it cannot be said that the Court's opinion operates only in the direction of letting some obvious racketeers get out of RICO. It also makes it clear that a hitherto dubious category is included, by establishing the rule that the "multiple scheme" test applied by the Court of Appeals here is not only nonexclusive but indeed nonexistent. This is, as far as I can discern, the Court's only substantive contribution to our prior guidance—and it is a contribution that makes it *more* rather than *less* difficult for a potential defendant to know whether his conduct is covered by RICO. Even if he is only involved in a single scheme, he may still be covered if there is present whatever is needed to establish a "threat of continuity." The Court gives us a nonexclusive list of three things that do so. Two of those presumably polar examples seem to me extremely difficult to apply—whether "the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes," *ante*, at 243, and whether "the predicates are a regular way of conducting defendant's ongoing legitimate business," *ibid.* What is included beyond these examples is vaguer still.

It is, however, unfair to be so critical of the Court's effort, because I would be unable to provide an interpretation of

RICO that gives significantly more guidance concerning its application. It is clear to me from the prologue of the statute, which describes a relatively narrow focus upon "organized crime," see Statement of Findings and Purpose, The Organized Crime Control Act of 1970, Pub. L. 91–452, 84 Stat. 922–923, that the word "pattern" in the phrase "pattern of racketeering activity" was meant to import some requirement beyond the mere existence of multiple predicate acts. Thus, when § 1961(5) says that a pattern "requires at least two acts of racketeering activity" it is describing what is needful but not sufficient. (If that were not the case, the concept of "pattern" would have been unnecessary, and the statute could simply have attached liability to "multiple acts of racketeering activity"). But what that something more is, is beyond me. As I have suggested, it is also beyond the Court. Today's opinion has added nothing to improve our prior guidance, which has created a kaleidoscope of Circuit positions, except to clarify that RICO may in addition be violated when there is a "threat of continuity." It seems to me this increases rather than removes the vagueness. There is no reason to believe that the Courts of Appeals will be any more unified in the future, than they have in the past, regarding the content of this law.

That situation is bad enough with respect to any statute, but it is intolerable with respect to RICO. For it is not only true, as JUSTICE MARSHALL commented in *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479 (1985), that our interpretation of RICO has "quite simply revolutionize[d] private litigation" and "validate[d] the federalization of broad areas of state common law of frauds," *id.*, at 501 (dissenting opinion), so that clarity and predictability in RICO's civil applications are particularly important; but it is also true that RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws, *FCC* v. *American Broadcasting Co.*, 347 U. S. 284, 296 (1954). No constitutional challenge

to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.

However unhelpful its guidance may be, however, I think the Court is correct in saying that nothing in the statute supports the proposition that predicate acts constituting part of a single scheme (or single episode) can never support a cause of action under RICO. Since the Court of Appeals here rested its decision on the contrary proposition, I concur in the judgment of the Court reversing the decision below.

Syllabus

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., ET AL. *v.* KELCO DISPOSAL, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88–556. Argued April 18, 1989—Decided June 26, 1989

Respondents Joseph Kelley and Kelco Disposal, Inc., filed suit against petitioners (collectively BFI) in Federal District Court, charging BFI with antitrust violations and with interfering with Kelco's contractual relations in violation of Vermont tort law. A jury found BFI liable on both counts, and awarded Kelco, in addition to $51,146 in compensatory damages, $6 million in punitive damages on the state-law claim. Denying BFI's post-trial motions, the District Court upheld the jury's punitive damages award. The Court of Appeals affirmed as to both liability and damages, holding that even if the Eighth Amendment were applicable, the punitive damages awarded were not so disproportionate as to be constitutionally excessive.

Held:

1. The Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages awards in cases between private parties; it does not constrain such an award when the government neither has prosecuted the action nor has any right to recover a share of the damages awarded. Pp. 262–276.

(a) The primary concern which drove the Framers of the Eighth Amendment was the potential for governmental abuse of "prosecutorial" power, not concern with the extent or purposes of civil damages. Nothing in English history suggests that the Excessive Fines Clause of the English Bill of Rights of 1689, the direct ancestor of the Eighth Amendment, was intended to apply to damages awarded in disputes between private parties. Pp. 264–268.

(b) The history of the use and abuse in England of amercements, including the fact that Magna Carta placed limits on the Crown's use of excessive amercements, is no basis for concluding that the Excessive Fines Clause limits a civil jury's ability to award punitive damages. Magna Carta was aimed at putting limits on the excesses of royal power, purposes which are clearly inapposite in a case where a private party receives exemplary damages from another party, and the government has no share in the recovery. Any overlap between civil and criminal procedure at the time of Magna Carta is insignificant when all indications are that English courts never have understood Magna Carta's amercements clauses to be relevant to private damages of any kind. Pp. 268–273.

(c) The language of the Excessive Fines Clause and the nature of our constitutional framework make it clear that the Eighth Amendment places limits on the steps a government may take against an individual. The fact that punitive damages are imposed through the aegis of courts and serve to advance governmental interests in punishment and deterrence is insufficient to support applying the Excessive Fines Clause in a case between private parties. Here, the government of Vermont has not taken a positive step to punish, as it does in the criminal context, nor used the civil courts to extract large payments or forfeiture for the purpose of raising revenue or disabling some individual. Pp. 273–276.

2. Because BFI failed to raise before either the District Court or the Court of Appeals the question whether the punitive damages award was excessive under the Due Process Clause of the Fourteenth Amendment, this Court will not consider the effect of due process on the award. Pp. 276–277.

3. Federal common law does not provide a basis for disturbing the jury's punitive damages award. In performing the limited function of a federal appellate court, this Court perceives no federal common-law standard, or compelling federal policy, that convinces the Court it should not accord considerable deference to a district court's decision not to order a new trial. The District Court in this case properly instructed the jury on Vermont law and applied the proper state-law standard in considering whether the verdict was excessive, and the Court of Appeals correctly held that the District Court did not abuse its discretion. Pp. 277–280.

845 F. 2d 404, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court with respect to Parts I, III, and IV, and the opinion of the Court with respect to Part II, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 280. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined, *post*, p. 282.

Andrew L. Frey argued the cause for petitioners. With him on the briefs were *Kenneth S. Geller*, *Mark I. Levy*, *James D. Holzhauer*, *Andrew J. Pincus*, and *J. Paul McGrath*.

H. Bartow Farr III argued the cause for respondents. With him on the brief were *Joel I. Klein*, *Paul M. Smith*, *Robert B. Hemley*, and *Norman Williams*.*

*Briefs of *amici curiae* urging reversal were filed for the city of New York by *Peter L. Zimroth*, *Leonard J. Koerner*, and *John Hogrogian*; for

JUSTICE BLACKMUN delivered the opinion of the Court.

We face here the questions whether the Excessive Fines Clause of the Eighth Amendment applies to a civil-jury award of punitive or exemplary damages, and, if so, whether an award of $6 million was excessive in this particular case.[1] This Court has never held, or even intimated, that the

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the American National Red Cross et al. by *Rex E. Lee*, *Carter G. Phillips*, *Elizabeth H. Esty*, *Charles A. Rothfeld*, *Benjamin W. Heineman, Jr.*, *Philip A. Lacovara*, and *Fred J. Hiestand;* for Arthur Andersen & Co. et al. by *Leonard P. Novello*, *Jon N. Ekdahl*, *Carl D. Liggio*, *Harris J. Amhowitz*, *Kenneth H. Lang*, and *Eldon Olson;* for Johnson & Higgins et al. by *George Clemon Freeman, Jr.*, *John Calvin Jeffries, Jr.*, and *James W. Morris III;* for Merrill Lynch, Pierce, Fenner & Smith, Inc., et al. by *Louis R. Cohen*, *Lloyd N. Cutler*, *Ronald J. Greene*, and *Robert C. Dinerstein;* for Navistar International Transportation Corp. by *David A. Strauss* and *John A. Rupp;* for the Pharmaceutical Manufacturers Association et al. by *John Reese*, *Geoffrey Richard Wagner Smith*, *Richard F. Kingham*, and *Bruce N. Kuhlik;* and for the United States Chamber of Commerce et al. by *Herbert L. Fenster* and *Malcolm E. Wheeler.*

Sherman L. Cohn and *Jeffrey Robert White* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the Alliance of American Insurers et al. by *Jack H. Blaine*, *Phillip E. Stano*, *Craig A. Berrington*, *John B. Crosby*, *John J. Nangle*, *Kenneth H. Nails*, *James H. Bradner, Jr.*, *Joe W. Peel*, and *Theresa L. Sorota;* for Bethlehem Steel Corp. et al. by *Martin S. Kaufman;* for the California Trial Lawyers Association by *Joseph Remcho*, *Harvey R. Levine*, *Amy Langerman*, and *William L. Denton;* for CBS, Inc., et al. by *P. Cameron DeVore*, *Marshall J. Nelson*, *Douglas P. Jacobs*, *Richard M. Schmidt*, *R. Bruce Rich*, *Harvey L. Lipton*, and *Bruce W. Sanford;* for the Consumers Union of the United States et al. by *Andrew F. Popper;* for Golden Rule Insurance Co. et al. by *Darrell S. Richey*, *N. Douglas Martin, Jr.*, and *Thomas J. Norman;* for Goodyear Tire & Rubber Co. by *Theodore B. Olson* and *Larry L. Simms;* for the Illinois Trial Lawyers Association by *Robert J. Cooney;* for the Insurance Consumer Action Network by *Roger O'Sullivan;* for Metromedia, Inc., by *Theodore B. Olson* and *Larry L. Simms;* for the National Association of Mutual Insurance Companies by *Bert S. Nettles*, *Forrest S. Latta*, and *Geoffrey C. Hazard, Jr.;* and for Martha Hoffmann Sanders by *Bruce J. Ennis, Jr.*, *Donald N. Bersoff*, and *W. Sidney Fuller.*

[1] Petitioners before this Court also challenge the award on due process grounds. For reasons set forth in Part III of this opinion, we decline to reach that issue.

Eighth Amendment serves as a check on the power of a jury to award damages in a civil case. Rather, our concerns in applying the Eighth Amendment have been with criminal process and with direct actions initiated by government to inflict punishment. Awards of punitive damages do not implicate these concerns. We therefore hold, on the basis of the history and purpose of the Eighth Amendment, that its Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties.

I

These weighty questions of constitutional law arise from an unlikely source: the waste-disposal business in Burlington, Vt. Petitioner Browning-Ferris Industries of Vermont, Inc., is a subsidiary of petitioner Browning-Ferris Industries, Inc. (collectively, BFI), which operates a nationwide commercial waste-collection and disposal business. In 1973 BFI entered the Burlington area trash-collection market, and in 1976 began to offer roll-off collection services.[2] Until 1980 BFI was the sole provider of such services in the Burlington area; that year respondent Joseph Kelley, who, since 1973, had been BFI's local district manager, went into business for himself, starting respondent Kelco Disposal, Inc. Within a year Kelco obtained nearly 40% of the Burlington roll-off market, and by 1982 Kelco's market share had risen to 43%. During 1982 BFI reacted by attempting to drive Kelco out of business, first by offering to buy Kelco and then by cutting prices by 40% or more on new business for approximately six months. The orders given to the Burlington BFI office by its regional vice president were clear: "Put [Kelley] out of business. Do whatever it takes. Squish him like a bug." App. 10. BFI's Burlington salesman was also instructed to

[2] "Roll-off waste collection is usually performed at large industrial locations and construction sites with the use of a large truck, a compactor, and a container that is much larger than the typical 'dumpster.'" 845 F. 2d 404, 406 (CA2 1988).

put Kelco out of business and told that if "it meant give the stuff away, give it away." *Ibid.*

During the first four months of BFI's predatory campaign, Kelco's revenues dropped 30%. Kelco's attorney wrote to BFI's legal department asserting that BFI's pricing strategy was illegal, and threatened to initiate court proceedings if it continued. BFI did not respond, and continued its price-cutting policy for several more months. BFI's market share remained stable from 1982 to 1984, but by 1985 Kelco had captured 56% of the market. That same year BFI sold out to a third party and left the Burlington market.

In 1984, Kelco and Kelley brought an action in the United States District Court for the District of Vermont, alleging a violation of § 2 of the Sherman Act for attempts to monopolize the Burlington roll-off market. They also claimed that BFI had interfered with Kelco's contractual relations in violation of Vermont tort law. Kelley's claims were severed from Kelco's, and Kelco's antitrust and tort claims were tried to a jury. After a 6-day trial BFI was found liable on both counts. A 1-day trial on damages followed, at which Kelco submitted evidence regarding the revenues and profits it lost as a result of BFI's predatory prices. Kelco's attorney urged the jury to return an award of punitive damages, asking the jurors to "deliver a message to Houston [BFI's headquarters]." *Id.*, at 53. Kelco also stressed BFI's total revenues of $1.3 billion in the previous year, noting that this figure broke down to $25 million a week. BFI urged that punitive damages were not appropriate, but made no argument as to amount.

The District Court instructed the jury that it could award punitive damages on the state-law claims if it found by clear and convincing evidence that BFI's conduct "revealed actual malice, outrageous conduct, or constituted a willful and wanton or reckless disregard of the plaintiff's rights." *Id.*, at 81. It also told the jury that in determining the amount of punitive damages it could take into account "the character of the

defendants, their financial standing, and the nature of their acts." *Ibid.* BFI raised no relevant objection to the charge on punitive damages. The jury returned a verdict of $51,146 in compensatory damages on both the federal-antitrust and state-tort counts, and $6 million in punitive damages.

BFI moved for judgment notwithstanding the verdict, a new trial, or remittitur. The District Court denied these motions and awarded Kelco $153,438 in treble damages and $212,500 in attorney's fees and costs on the antitrust claim, or, in the alternative, $6,066,082.74 in compensatory and punitive damages on the state-law claim. BFI appealed. The United States Court of Appeals for the Second Circuit affirmed the judgment both as to liability and as to damages. 845 F. 2d 404 (1988). On the issue of punitive damages, the court noted that the evidence showed that BFI "wilfully and deliberately attempted to drive Kelco out of the market," and found no indication of jury prejudice or bias. *Id.*, at 410. Addressing the Eighth Amendment issue, the court noted that even if the Amendment were applicable "to this nominally civil case," the damages were not "so disproportionate as to be cruel, unusual, or constitutionally excessive," and upheld the award. *Ibid.* Because of its importance, we granted certiorari on the punitive damages issue. 488 U. S. 980 (1988).

II

The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Although this Court has never considered an application of the Excessive Fines Clause, it has interpreted the Amendment in its entirety in a way which suggests that the Clause does not apply to a civil-jury award of punitive damages. Given that the Amendment is addressed to bail, fines, and punishments, our cases long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments. See, *e. g.*, *Ex parte Watkins*, 7 Pet. 568, 573–574 (1833) ("The eighth

amendment is addressed to courts of the United States exercising criminal jurisdiction"); *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730 (1893) (Amendment inapplicable to deportation because deportation is not punishment for a crime); *Ingraham* v. *Wright*, 430 U. S. 651, 664–668 (1977). "Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government." *Id.*, at 664.[3]

To decide the instant case, however, we need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the Clause's

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[3] *Ingraham*, like most of our Eighth Amendment cases, involved the Cruel and Unusual Punishments Clause, and it therefore is not directly controlling in this Excessive Fines Clause case. The insights into the meaning of the Eighth Amendment reached in *Ingraham* and similar cases, however, are highly instructive.

We left open in *Ingraham* the possibility that the Cruel and Unusual Punishments Clause might find application in some civil cases. See 430 U. S., at 669, n. 37. The examples we cited as possibilities—persons confined in mental or juvenile institutions—do not provide much support for petitioners' argument that the Excessive Fines Clause is applicable to a civil award of punitive damages. In any event, petitioners have not made any argument specifically based on the Cruel and Unusual Punishments Clause.

There is language in *Carlson* v. *Landon*, 342 U. S. 524, 546 (1952), suggesting that the Bail Clause may be implicated in civil deportation proceedings. The Court there held that "the Eighth Amendment does not require that bail be allowed" in such cases, but the opinion in that case never addressed the question whether the Eighth Amendment applied in civil cases: the Court held that the Bail Clause does not require Congress to provide for bail in *any* case, but prohibits only the imposition of *excessive* bail. *Carlson* provides petitioners with little support for another reason as well. Bail, by its very nature, is implicated only when there is a direct government restraint on personal liberty, be it in a criminal case or in a civil deportation proceeding. The potential for governmental abuse which the Bail Clause guards against is present in both instances, in a way that the abuses against which the Excessive Fines Clause protects are not present when a jury assesses punitive damages.

reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded. To hold otherwise, we believe, would be to ignore the purposes and concerns of the Amendment, as illuminated by its history.[4]

A

The Eighth Amendment received little debate in the First Congress, see *Weems* v. *United States*, 217 U. S. 349, 368 (1910), and the Excessive Fines Clause received even less attention. This is not surprising; at least eight of the original States which ratified the Constitution had some equivalent of the Excessive Fines Clause in their respective Declarations of Rights or State Constitutions,[5] so the matter was not a likely source of controversy or extensive discussion. Although the prohibition of excessive fines was mentioned as part of a complaint that the Amendment was unnecessary and imprecise, see 217 U. S., at 369, Congress did not discuss

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[4] The same basic mode of inquiry should be applied in considering the scope of the Excessive Fines Clause as is proper in other Eighth Amendment contexts. We look to the origins of the Clause and the purposes which directed its Framers. "The applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation." *Ingraham*, 430 U. S., at 670–671, n. 39. We emphasize, however, that this historical emphasis concerns the question of when the Eighth Amendment is to be applied; as the Court's jurisprudence under the Cruel and Unusual Punishments Clause indicates, its approach has not relied on history to the same extent when considering the scope of the Amendment. See *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion) ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

[5] Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Virginia all had a Declaration of Rights or a Constitution expressly prohibiting excessive fines. See 1 B. Schwartz, The Bill of Rights: A Documentary History 235 (Virginia), 272 (Pennsylvania), 278 (Delaware), 282 (Maryland), 287 (North Carolina), 300 (Georgia), 343 (Massachusetts), and 379 (New Hampshire) (1971).

what was meant by the term "fines," or whether the prohibition had any application in the civil context. In the absence of direct evidence of Congress' intended meaning, we think it significant that at the time of the drafting and ratification of the Amendment, the word "fine" was understood to mean a payment to a sovereign as punishment for some offense.[6] Then, as now, fines were assessed in criminal, rather than in private civil, actions.[7]

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[6] A "fine signifieth a percuniarie punishment for an offence, or a contempt committed against the king." 1 E. Coke, Institutes *126b. The second edition of Cunningham's Law-Dictionary, published in 1771, defined "fines for offences" as "amends, pecuniary punishment, or recompence for an offence committed against the King and his laws, or against the Lord of a manor." 2 T. Cunningham, A New and Complete Law-Dictionary (unpaginated). See also 1 T. Tomlins, Law-Dictionary 796–799 (1836) (same); 1 J. Bouvier, Law Dictionary 525 (4th ed. 1852) (same).

[7] Petitioners have come forward with no evidence, or argument, which convinces us that the word "fine," as used in the late 18th century, would have encompassed private civil damages of any kind. Indeed, the term "damages" was also in use at the time the Eighth Amendment was drafted and ratified, and had a precise meaning limited to the civil context. Cunningham defined damages as follows: "in the Common law it is a part of what the jurors are to inquire of, and bring in, when an action passeth for the plaintiff: . . . [Damages] comprehend a recompence for what the plaintiff or demandant hath suffered, by means of the wrong done to him by the defendant or tenant." 1 Cunningham, *supra;* see also 1 Tomlins, at 498 (same); 1 Bouvier, at 360 (same). The dichotomy between fines and damages was clear.

There have been cases which have used the word "fine" to refer to civil damages assessed by statute. As the partial dissent notes, two cases decided 70 years after the Excessive Fines Clause was adopted considered the term "fines" to include money, recovered in a civil suit, which was paid to government. See *Hanscomb* v. *Russell*, 77 Mass. 373, 375 (1858); *Gosselink* v. *Campbell*, 4 Iowa 296 (1856). These cases, however, provide no support for petitioners' argument that the Eighth Amendment is applicable in cases between private parties. As to the partial dissent's reliance on the Bard, *post*, at 290, we can only observe:

> Though Shakespeare, of course,
> Knew the Law of his time,
> He was foremost a poet,
> In search of a rhyme.

But there is more than inferential evidence from language to support our conclusion that the Excessive Fines Clause is inapplicable to an award of punitive damages. The undisputed purpose and history of the Amendment generally, and of the Excessive Fines Clause specifically, confirm our reading. The Eighth Amendment clearly was adopted with the particular intent of placing limits on the powers of the new Government. "At the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any protection for persons convicted of crimes. This criticism provided the impetus for inclusion of the Eighth Amendment in the Bill of Rights." *Ingraham* v. *Wright*, 430 U. S., at 666 (footnote omitted). See generally *Barron* v. *Mayor and City Council of Baltimore*, 7 Pet. 243, 250 (1833) ("In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended"); *Weems* v. *United States*, 217 U. S., at 372 (the "predominant political impulse" of proponents of the Bill of Rights "was distrust of power, and they insisted on constitutional limitations against its abuse"). Simply put, the primary focus of the Eighth Amendment was the potential for governmental abuse of its "prosecutorial" power, not concern with the extent or purposes of civil damages.

Moreover, specific and persuasive support for our reading of the Excessive Fines Clause comes from the pedigree of the Clause itself. As we have noted in other cases, it is clear that the Eighth Amendment was "based directly on Art I, § 9, of the Virginia Declaration of Rights," which "adopted verbatim the language of the English Bill of Rights." *Solem* v. *Helm*, 463 U. S. 277, 285, n. 10 (1983). Section 10 of the English Bill of Rights of 1689, like our Eighth Amendment, states that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large

440, 441 (1689). We recounted in *Ingraham*, 430 U. S., at 664: "The English version, adopted after the accession of William and Mary, was intended to curb the excesses of English judges under the reign of James II." During the reigns of the Stuarts the King's judges had imposed heavy fines on the King's enemies, much as the Star Chamber had done before its abolition in 1641. L. Schwoerer, The Declaration of Rights, 1689, p. 91 (1981). In the 1680's the use of fines "became even more excessive and partisan," and some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed. *Ibid.*[8] The group which drew up the 1689 Bill of Rights had firsthand experience; several had been subjected to heavy fines by the King's bench. *Id.*, at 91–92, and n. 198.

The Framers of our Bill of Rights were aware and took account of the abuses that led to the 1689 Bill of Rights.[9] This history, when coupled with the fact that the accepted English definition of "fine" in 1689 appears to be identical to that in use in colonial America at the time of our Bill of Rights,[10] seems to us clear support for reading our Excessive Fines Clause as limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends. Providing even clearer support for this view is the English case law, immediately prior to the enactment of

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[8] For particular examples, see the 1683 *Trial of Thomas Pilkington, and others, for a Riot*, 9 State Tr. 187, and the 1684 *Trial of Sir Samuel Barnardiston*, 9 State Tr. 1333.

[9] Justice Story was of the view that the Eighth Amendment was "adopted as an admonition to all departments of the national government, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts." 2 J. Story, Commentaries on the Constitution of the United States 624 (T. Cooley 4th ed. 1873).

[10] By 1689, the definition of "fines" and "damages" discussed in nn. 6 and 7, *supra*, already had taken hold. For a definition of "damages," see T. Blount, A Law-Dictionary (1670) (unpaginated).

the English Bill of Rights, which stressed the difference between civil damages and criminal fines. See *Lord Townsend* v. *Hughes*, 2 Mod. 150, 86 Eng. Rep. 994 (C. P. 1677). In short, nothing in English history suggests that the Excessive Fines Clause of the 1689 Bill of Rights, the direct ancestor of our Eighth Amendment, was intended to apply to damages awarded in disputes between private parties. Instead, the history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.

B

Petitioners, however, argue that the Excessive Fines Clause "derives from limitations in English law on monetary penalties exacted in private civil cases to punish and deter misconduct." Brief for Petitioners 17. They recognize that nothing in the history we have recounted thus far espouses that view. To find support, they turn the clock hundreds of years further back to English history prior to Magna Carta, and in particular to the use and abuse of "amercements." According to petitioners, amercements were essentially civil damages, and the limits Magna Carta placed on the use of amercements were the forerunners of the 1689 Bill of Rights' prohibition on excessive fines. In their view, the English Bill of Rights and our Eighth Amendment must be understood as reaching beyond the criminal context, because Magna Carta did. Punitive damages, they suggest, must be within the scope of the Excessive Fines Clause because they are a modern-day analog of 13th-century amercements.

The argument is somewhat intriguing, but we hesitate to place great emphasis on the particulars of 13th-century English practice, particularly when the interpretation we are urged to adopt appears to conflict with the lessons of more recent history. Even so, our understanding of the use of amercements, and the development of actions for damages at

common law, convince us that petitioners' view of the relevant history does not support the result they seek.

Amercements were payments to the Crown, and were required of individuals who were "in the King's mercy," because of some act offensive to the Crown. Those acts ranged from what we today would consider minor criminal offenses, such as breach of the King's peace with force and arms, to "civil" wrongs against the King, such as infringing "a final concord" made in the King's court. See 2 F. Pollock & F. Maitland, History of English Law 519 (2d ed. 1905) (Pollock & Maitland); see also *Solem* v. *Helm*, 463 U. S., at 284, n. 8 (an amercement "was the most common criminal sanction in 13th-century England"); W. McKechnie, Magna Carta 285–286 (2d ed. 1958) (McKechnie) (discussing amercements as a step in the development of criminal law). Amercements were an "all-purpose" royal penalty; they were used not only against plaintiffs who failed to follow the complex rules of pleading[11] and against defendants who today would be liable in tort, but also against an entire township which failed to live up to its obligations, or against a sheriff who neglected his duties.[12] The use of amercements was widespread; one commentary has said that most men in England could expect

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[11] See Treatise on the Laws and Customs of the Realm of England Commonly called Glanvill 127–128 (G. Hall ed. 1965) (written between 1187–1189); Introduction to the Curia Regis Rolls, 1199–1230 A. D., in 62 Publications of the Selden Society 465 (C. Flower ed. 1944). Defendants could be amerced as well. "The justices did not hesitate to extract amercements from both parties when the occasion arose." *Id.*, at 466. For a wide variety of conduct for which amercements were assessed on parties, see *Beecher's Case*, 8 Co. Rep. 58a, 59b–60a, 77 Eng. Rep. 559, 564–565 (Ex. 1609); 1 Select Pleas of the Crown (A. D. 1200–1225), in 1 Publications of the Selden Society 2, 4, 5–6, 7–8, 9–10, 13, 43–44, 90 (F. Maitland ed. 1888); 62 Selden Society, at 464–467.

[12] See *id.*, at 467; Pleas of the Crown for the County of Gloucester: A. D. 1221, p. xxxiii (F. Maitland ed. 1884) (Pleas for Gloucester); see generally 1 Selden Society.

to be amerced at least once a year. See 2 Pollock & Maitland 513.[13]

In response to the frequent, and occasionally abusive, use of amercements by the King, Magna Carta included several provisions placing limits on the circumstances under which a person could be amerced, and the amount of the amercement.[14] The barons who forced John to agree to Magna Carta sought to reduce arbitrary royal power, and in particu-

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[13] Without discussing the complex origins of civil damages in detail, see 2 Pollock & Maitland 522–525; 62 Selden Society, at 473–479, we can say confidently that damages and amercements were not the same. In the time before Magna Carta, damages awards were rare, 2 Pollock & Maitland 523, the more usual relief being a fixed monetary payment or specific relief. But "[t]he distinction between amercements and damages is well known. The former were payable to the crown after legal action or for an error or ineptitude which took place in its course; the latter represented the loss incurred by a litigant through an unlawful act. They were payable to [the private litigant]." 62 Selden Society, at 463.

The only overlap between the two might occur in the Assize of Novel Disseisin, in which the court could grant the recovery of land and chattels, and might amerce the defendant as well. *Id.*, at 156; see generally 2 Pollock & Maitland 44–56, 523–524. But even in this action, the amerciable offense is one to the Crown, for every disseisin was a breach of the peace, as well as an improper possession of another's property. *Id.*, at 44. Along these lines, see 62 Selden Society, at 478–479 ("In comparison with amercements, damages were seldom remitted, for the good reason that the king could do as he liked with his own but had to be careful not to show mercy at the expense of a wronged subject").

[14] "A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (2) and a Merchant likewise, saving to him his Merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage, if he falls into our mercy. (4) And none of the said amerciaments shall be assessed, but by the oath of honest and lawful men of the vicinage. (5) Earls and Barons shall not be amerced but by their Peers, and after the manner of their offence. (6) No man of the Church shall be amerced after the quantity of his spiritual Benefice, but after his Lay-tenement, and after the quantity of his offence." Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 5 (1769), confirmed, 25 Edw. I, ch. 1 (1297), *id.*, at 131–132.

lar to limit the King's use of amercements as a source of royal revenue, and as a weapon against enemies of the Crown.[15] The Amercements Clause of Magna Carta limited these abuses in four ways: by requiring that one be amerced only for some genuine harm to the Crown; by requiring that the amount of the amercement be proportioned to the wrong; by requiring that the amercement not be so large as to deprive him of his livelihood; and by requiring that the amount of the amercement be fixed by one's peers, sworn to amerce only in a proportionate amount.[16]

Petitioners, and some commentators,[17] find in this history a basis for concluding that the Excessive Fines Clause operates to limit the ability of a civil jury to award punitive damages. We do not agree. Whatever uncertainties surround the use of amercements prior to Magna Carta, the compact signed at Runnymede was aimed at putting limits on the

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[15] See generally McKechnie 278; G. Smith, A Constitutional and Legal History of England 129, 131 (1955). Although most amercements were not large, see McKechnie 287; 2 Pollock & Maitland 513, being placed in the King's mercy meant, at least theoretically, that a man's estate was in the King's hands, and it was within the King's power to require its forfeit. See 62 Selden Society, at 463; McKechnie 71–72 (one called to the King's service who did not go was in mercy, and his estate was subject to forfeiture). Amercements also resembled a form of taxation, particularly when used against entire townships. See Pleas for Gloucester xxxiv.

[16] According to Pollock and Maitland, after the court found a person to be in the King's mercy, and that person obtained a pledge for the payment of whatever sum was to be amerced, the court would go on to other cases. At this point the person had not yet been amerced. "At the end of the session some good and lawful men, the peers of the offender (two seem to be enough) were sworn to 'affeer' the amercements. They set upon each offender some fixed sum of money that he was to pay; this sum is his amercement." 2 Pollock & Maitland 513; see also Pleas for Gloucester xxxiv. This procedure indicates that amercements were assessed by a "jury" different from that which considered the case.

[17] See, *e. g.*, Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons from History, 40 Vand. L. Rev. 1233 (1987); Note, The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment, 85 Mich. L. Rev. 1699 (1987).

power of the King, on the "tyrannical extortions, under the name of amercements, with which John had oppressed his people," T. Taswell-Langmead, English Constitutional History 83 (T. Plucknett 10th ed. 1946), whether that power be exercised for purposes of oppressing political opponents, for raising revenue in unfair ways, or for any other improper use. See 2 W. Holdsworth, A History of English Law 214 (4th ed. 1936). These concerns are clearly inapposite in a case where a private party receives exemplary damages from another party, and the government has no share in the recovery. Cf. *United States* v. *Halper*, 490 U. S. 435 (1989) (Double Jeopardy Clause).

Petitioners ultimately rely on little more than the fact that the distinction between civil and criminal law was cloudy (and perhaps nonexistent) at the time of Magna Carta. But any overlap between civil and criminal procedure at that time does nothing to support petitioners' case, when all the indications are that English courts never have understood the amercements clauses to be relevant to private damages of any kind, either then or at any later time. See *Lord Townsend* v. *Hughes*, 2 Mod., at 151, 86 Eng. Rep., at 994–995 (Magna Carta's amercements provisions apply in criminal, but not civil, cases). Even after the common law had developed to the point where courts occasionally did decrease a damages award or eliminate it altogether, such action was never predicated on the theory that the *government* somehow had overstepped its bounds. Rather, the perceived error was one made by the jury, as determined by reference to common-law, rather than constitutional, standards. Whether based on reasoning that the jury's award was so excessive that it must have been based on bias or prejudice, see *Wood* v. *Gunston*, Sty. 466, 82 Eng. Rep. 867 (K. B. 1655); *Leith* v. *Pope*, 2 Bl. W. 1327, 96 Eng. Rep. 777 (C. P. 1780), or that the jury must have misconstrued the evidence, see *Ash* v. *Ash*, Comb. 357, 90 Eng. Rep. 526 (1696), the proper focus was, and still is, on the behavior of the jury. It is diffi-

cult to understand how Magna Carta, or the English Bill of Rights as viewed through the lens of Magna Carta, compels us to read our Eighth Amendment's Excessive Fines Clause as applying to punitive damages when those documents themselves were never so applied.[18]

C

Our conclusion that the Framers of the Eighth Amendment did not expressly intend it to apply to damages awards made by civil juries does not necessarily complete our inquiry. Our Eighth Amendment jurisprudence has not been inflexible. The Court, when considering the Eighth Amendment, has stated: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions." *Weems* v. *United States*, 217 U. S., at 373.[19] This aspect

[18] So, for example, when the House of Lords placed certain limits on the types of cases in which exemplary damages could be awarded, Lord Devlin's extensive discussion mentioned neither Magna Carta or the Excessive Fines Clause of the 1689 Bill of Rights, nor did it suggest that English constitutional or common law placed any restrictions on the award of exemplary damages other than those discussed above. *Rookes* v. *Barnard*, [1964] A. C. 1129, 1221–1231. In fact, Lord Devlin recognized that his suggested alterations were a departure from the traditional common-law view. *Id.*, at 1226. We find it significant that other countries that share an English common-law heritage have not followed the decision in *Rookes*, and continue to allow punitive or exemplary damages to be awarded without substantial interference. See, *e. g.*, *Uren* v. *John Fairfax & Sons*, [1967] A. L. R. 25, 27 (Australia) (declining to follow *Rookes*); *Bahner* v. *Marwest Hotel Co.*, 6 D. L. R. 3d 322, 329 (1969) (Canada) (same); *Fogg* v. *McKnight*, [1968] N. Z. L. R. 330, 333 (New Zealand) (same).

[19] In *Weems*, Justice McKenna continued his writing for the Court: "[Constitutions] are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution,

of our Eighth Amendment jurisprudence might have some force here were punitive damages a strictly modern creation, without solid grounding in pre-Revolutionary days. But the practice of awarding damages far in excess of actual compensation for quantifiable injuries was well recognized at the time the Framers produced the Eighth Amendment. Awards of double or treble damages authorized by statute date back to the 13th century, see Statute of Gloucester, 1278, 6 Edw. I, ch. 5, 1 Stat. at Large 66 (treble damages for waste); see also 2 Pollock & Maitland 522, and the doctrine was expressly recognized in cases as early as 1763.[20] Despite this recognition of civil exemplary damages as puni-

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therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality." 217 U. S., at 373.

[20] Among the first cases to make explicit reference to exemplary damages was *Huckle* v. *Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K. B. 1763), where the court refused to set aside a jury award of £300 where the plaintiff's injury would have been compensated by £20. Upholding what it referred to as an award of "exemplary damages," the court noted that "the law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending on a vast variety of causes, facts, and circumstances," and declined to "intermeddle" in the damages determination. "[I]t must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages." *Id.*, at 206–207, 95 Eng. Rep., at 768–769. Another case decided that year stated the applicable principle with particular clarity: "Damages are designed not only as a satisfaction to the injured person, but likewise as punishment to the guilty, to deter from any such proceeding for the future and as a proof of the detestation of the jury to the action itself." *Wilkes* v. *Wood*, Lofft 1, 18–19, 98 Eng. Rep. 489, 498–499 (K. B.). Other English cases followed a similar approach. See, *e. g.*, *Roe* v. *Hawkes*, 1 Lev. 97, 83 Eng. Rep. 316 (K. B. 1663); *Grey* v. *Grant*, 2 Wils. 252, 253, 95 Eng. Rep. 794, 795 (K. B. 1764); *Benson* v. *Frederick*, 3 Burr. 1846, 97 Eng. Rep. 1130 (K. B. 1766).

tive in nature, the Eighth Amendment did not expressly include it within its scope. Rather, as we earlier have noted, the text of the Amendment points to an intent to deal only with the prosecutorial powers of government.

Furthermore, even if we were prepared to extend the scope of the Excessive Fines Clause beyond the context where the Framers clearly intended it to apply, we would not be persuaded to do so with respect to cases of punitive damages awards in private civil cases, because they are too far afield from the concerns that animate the Eighth Amendment. We think it clear, from both the language of the Excessive Fines Clause and the nature of our constitutional framework, that the Eighth Amendment places limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments. The fact that punitive damages are imposed through the aegis of courts and serve to advance governmental interests is insufficient to support the step petitioners ask us to take. While we agree with petitioners that punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law, we fail to see how this overlap requires us to apply the Excessive Fines Clause in a case between private parties. Here the government of Vermont has not taken a positive step to punish, as it most obviously does in the criminal context, nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual.[21] We shall not ignore the language of the Exces-

[21] In *United States* v. *Halper*, 490 U. S. 435 (1989), we held that the Double Jeopardy Clause of the Fifth Amendment places limits on the amounts the Federal Government may recover in a civil action, after the defendant already has been punished through the criminal process. While our opinion in *Halper* implies that punitive damages awarded to the Government in a civil action may raise Eighth Amendment concerns, that case is materially different from this one, because there the *Government* was exacting punishment in a civil action, whereas here the damages were

sive Fines Clause, or its history, or the theory on which it is based, in order to apply it to punitive damages.[22]

III

Petitioners also ask us to review the punitive damages award to determine whether it is excessive under the Due Process Clause of the Fourteenth Amendment. The parties agree that due process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness. But petitioners make no claim that the proceedings themselves were unfair, or that the jury was biased or blinded by emotion or prejudice. Instead, they seek further due process protections, addressed directly to the size of the damages award. There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme, see, *e. g.*, *St. Louis, I. M. & S. R. Co.* v. *Williams*, 251 U. S. 63, 66–67 (1919), but we have never addressed the precise question presented here:

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awarded to a private party. We noted in *Halper* that nothing in our opinion "precludes a *private* party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment. The protections of the Double Jeopardy Clause are not triggered by litigation between private parties." *Id.*, at 451 (emphasis added). We left open the question whether a *qui tam* action, in which a private party brings suit in the name of the United States and shares in any award of damages, would implicate the Double Jeopardy Clause. *Id.*, at 451, n. 11. We leave the same question open for purposes of the Eighth Amendment's Excessive Fines Clause.

[22] Because of the result we reach today, we need not answer several questions that otherwise might be necessarily antecedent to finding the Eighth Amendment's Excessive Fines Clause applicable to an award of punitive damages, and that have not been briefed by the parties. We shall not decide whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment, nor shall we decide whether the Eighth Amendment protects corporations as well as individuals.

whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit. See *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71, 87 (1988) (O'CONNOR, J., concurring in part and concurring in judgment). That inquiry must await another day. Because petitioners failed to raise their due process argument before either the District Court or the Court of Appeals, and made no specific mention of it in their petition for certiorari in this Court, we shall not consider its effect on this award.[23]

IV

Petitioners also ask us to hold that this award of punitive damages is excessive as a matter of federal common law. Rather than directing us to a developed body of federal law,

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[23] Petitioners claim that the due process question is within the "clear intendment" of the objection it has made throughout these proceedings. Our review of the proceedings in the District Court and the Court of Appeals shows that petitioners' primary claim in both of those courts was that the punitive damages award violated Vermont state law. Petitioners also argued that the award violated the Eighth Amendment. We fail to see how the claim that the award violates due process is necessarily a part of these arguments. We shall not assume that a nonconstitutional argument also includes a constitutional one, and shall not stretch the specific claims made under the Eighth Amendment to cover those that might arise under the Due Process Clause as well. Although in particular cases we have applied the doctrine petitioners advance, see *Braniff Airways, Inc.* v. *Nebraska Bd. of Equalization and Assessment*, 347 U. S. 590, 598–599 (1954), this is not a case where a respondent is making arguments in support of a judgment. See *Revere* v. *Massachusetts General Hospital*, 463 U. S. 239, 244, n. 6 (1983); *Dandridge* v. *Williams*, 397 U. S. 471, 475–476, n. 6 (1970). In the absence of a developed record on the issues relevant to this due process inquiry, we shall not stretch the "clear intendment" doctrine to include this case, as we do not think that the due process question is "only an enlargement" of the Eighth Amendment inquiry. Although the due process analysis of an award of punitive damages may track closely the Eighth Amendment analysis suggested by petitioners, we shall not assume that to be the case and shall not attempt to decide the question in the absence of a record on the due process point developed in the District Court and the Court of Appeals.

however, they merely repeat the standards they urged us to adopt under the Eighth Amendment. It is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant petitioners' motion, under Federal Rule of Civil Procedure 59, for a new trial or remittitur. Applying proper deference to the District Court, the award of punitive damages should stand.

Review of the District Court's order involves questions of both state and federal law. In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.[24] Fed-

[24] The law of punitive damages in Vermont is typical of the law in most American jurisdictions. The doctrine has long standing. As far back as 1862, the Supreme Court of Vermont noted that the law on exemplary damages was "long settled in this state." *Nye* v. *Merriam*, 35 Vt. 438, 446. A Vermont jury may award punitive damages only if the evidence supports a finding that the defendant acted with malice, see, *e. g.*, *Appropriate Technology Corp.* v. *Palma*, 146 Vt. 643, 647, 508 A. 2d 724, 726 (1986), or "malice or wantonness shown by the act," *Rogers* v. *Bigelow*, 90 Vt. 41, 49, 96 A. 417, 420 (1916). Punitive damages awards may be set aside if grossly and manifestly excessive. See *Glidden* v. *Skinner*, 142 Vt. 644, 648, 458 A. 2d 1142, 1145 (1983). The Vermont Supreme Court has declined to adopt a rule of proportionality between compensatory and punitive damages, *Pezzano* v. *Bonneau*, 133 Vt. 88, 92, 329 A. 2d 659, 661 (1974), but does not allow punitive damages to stand when an award of compensatory damages has been vacated, *Allard* v. *Ford Motor Credit Co.*, 139 Vt. 162, 164, 422 A. 2d 940, 942 (1980). Once a plaintiff has presented sufficient evidence of malice, evidence of "'the defendant's pecuniary ability may be considered in order to determine what would be a just punishment for him.'" *Lent* v. *Huntoon*, 143 Vt. 539, 550, 470 A. 2d 1162, 1170 (1983), quoting *Kidder* v. *Bacon*, 74 Vt. 263, 274, 52 A. 322, 324 (1902).

The $6 million in punitive damages in this case apparently is the largest such judgment in the history of Vermont; there have been other substan-

eral law, however, will control on those issues involving the proper review of the jury award by a federal district court and court of appeals. See *Donovan* v. *Penn Shipping Co.*, 429 U. S. 648, 649–650 (1977); see also 6A J. Moore, J. Lucas, & G. Grotheer, Moore's Federal Practice, ¶59.04[1] (2d ed. 1987).

In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard.[25] Although petitioners and their *amici* would like us to craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages, or makes reference to statutory penalties for similar conduct, these are matters of state, and not federal, common law. Adopting a rule along the lines petitioners suggest would require us to ignore the distinction between the state-law and federal-law issues. For obvious reasons we decline that invitation.

In performing the limited function of a federal appellate court, we perceive no federal common-law standard, or com-

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tial jury awards, however, in the State. See, *e. g.*, *Coty* v. *Ramsey Associates, Inc.*, 149 Vt. 451, 546 A. 2d 196 ($380,000 in punitive damages), cert. denied, 487 U. S. 1236 (1988).

[25] We have never held expressly that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive. Although we granted certiorari in two cases in order to consider the issue, in both instances we found it unnecessary to reach the question when we decided the case. See *Neese* v. *Southern R. Co.*, 350 U. S. 77 (1955) (even assuming appellate review power under the Seventh Amendment, Court of Appeals was not justified in reversing denial of new trial on the particular facts of the case); *Grunenthal* v. *Long Island R. Co.*, 393 U. S. 156, 158 (1968) (same). In light of the result we reach today, we follow the same course here.

pelling federal policy, which convinces us that we should not continue to accord considerable deference to a district court's decision not to order a new trial.[26] In this case the District Court properly instructed the jury on Vermont law, see n. 24, *supra*, and applied the proper state-law standard in considering whether the verdict returned was excessive. Although the opinion of the Court of Appeals is not clear to us as to whether it applied state or federal law in reviewing the District Court's order denying the new trial or remittitur, we are convinced that its conclusion that there was no abuse of discretion by the District Court is consistent with federal standards, in light of the broad range of factors Vermont law permits juries to consider in awarding punitive damages.

V

In sum, we conclude that neither federal common law nor the Excessive Fines Clause of the Eighth Amendment provides a basis for disturbing the jury's punitive damages award in this case. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties. See *ante*, at 276–277.

Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are "grossly excessive," *Waters-Pierce Oil Co.* v.

[26] This is particularly true because the federal courts operate under the strictures of the Seventh Amendment. As a result, we are reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury.

Texas, 212 U. S. 86, 111 (1909), or "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable," *St. Louis, I. M. & S. R. Co.* v. *Williams*, 251 U. S. 63, 66–67 (1919). See also *Southwestern Telegraph & Telephone Co.* v. *Danaher*, 238 U. S. 482, 491 (1915); *Missouri Pacific R. Co.* v. *Humes*, 115 U. S. 512, 522–523 (1885). I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits.

Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. Indeed, the jury in this case was sent to the jury room with nothing more than the following terse instruction: "In determining the amount of punitive damages, . . . you may take into account the character of the defendants, their financial standing, and the nature of their acts." App. 81. Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best. Because "'[t]he touchstone of due process is protection of the individual against arbitrary action of government,'" *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986), quoting *Wolff* v. *McDonnell*, 418 U. S. 539, 558 (1974), I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.

Since the Court correctly concludes that Browning-Ferris' challenge based on the Due Process Clause is not properly

before us, however, I leave fuller discussion of these matters for another day.

JUSTICE O'CONNOR, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part.

Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. See Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1329–1332 (1976). Since then, awards more than 30 times as high have been sustained on appeal. See *Ford Motor Co.* v. *Durrill*, 714 S. W. 2d 329 (Tex. App. 1986) ($10 million); *Ford Motor Co.* v. *Stubblefield*, 171 Ga. App. 331, 319 S. E. 2d 470 (1984) ($8 million); *Palmer* v. *A. H. Robins Co.*, 684 P. 2d 187 (Colo. 1984) ($6.2 million). The threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. See, *e. g.*, Brief for Pharmaceutical Manufacturers Association et. al. as *Amici Curiae* 5–23. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages. See generally P. Huber, Liability: The Legal Revolution and Its Consequences 152–171 (1988).

The trend toward multimillion dollar awards of punitive damages is exemplified by this case. A Vermont jury found that Browning-Ferris Industries, Inc. (BFI), tried to monopolize the Burlington roll-off waste disposal market and interfered with the contractual relations of Kelco Disposal, Inc. (Kelco). The jury awarded Kelco $51,000 in compensatory damages (later trebled) on the antitrust claim, and over $6 million in punitive damages. The award of punitive damages was 117 times the actual damages suffered by Kelco and far exceeds the highest reported award of punitive damages affirmed by a Vermont court. Cf. *Coty* v. *Ramsey Associates*,

Inc., 149 Vt. 451, 546 A. 2d 196 (punitive damages of $380,000 based on compensatory damages of $187,500), cert. denied, 487 U. S. 1236 (1988).

The Court holds today that the Excessive Fines Clause of the Eighth Amendment places no limits on the amount of punitive damages that can be awarded in a suit between private parties. That result is neither compelled by history nor supported by precedent, and I therefore respectfully dissent from Part II of the Court's opinion. I do, however, agree with the Court that no due process claims—either procedural or substantive—are properly presented in this case, and that the award of punitive damages here should not be overturned as a matter of federal common law. I therefore join Parts I, III, and IV of the Court's opinion. Moreover, I share JUSTICE BRENNAN's view, *ante*, at 280–282, that nothing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed, and I adhere to my comments in *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71, 86–89 (1988) (opinion concurring in part and concurring in judgment), regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages.

I

Before considering the merits of BFI's Eighth Amendment claim, two preliminary questions must be addressed. First, does the Excessive Fines Clause apply to the States through the Due Process Clause of the Fourteenth Amendment? Second, is a corporation such as BFI protected by the Excessive Fines Clause?

A

The award of punitive damages against BFI was based on Vermont law. See 845 F. 2d 404, 409 (CA2 1988). Almost 100 years ago, the Court held that the Eighth Amendment did not apply to the States. See *O'Neil* v. *Vermont*, 144 U. S. 323, 332 (1892). See also *Pervear* v. *Commonwealth*,

5 Wall. 475 (1867). But 13 years before *O'Neil*, the Court had applied the Eighth Amendment's ban on cruel and unusual punishments to a Territory. See *Wilkerson* v. *Utah*, 99 U. S. 130 (1879) (holding that execution by firing squad was not prohibited by the Eighth Amendment). In *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 462 (1947), the Court assumed, without deciding, that the Eighth Amendment applied to the States. Any confusion created by *O'Neil*, *Wilkerson*, and *Francis* was eliminated in *Robinson* v. *California*, 370 U. S. 660, 666–667 (1962), in which the Court, albeit without discussion, reversed a state conviction for the offense of narcotics addiction as constituting cruel and unusual punishment and being repugnant to the Fourteenth Amendment. Since *Robinson*, the Cruel and Unusual Punishments Clause has been regularly applied to the States, most notably in the capital sentencing context. In addition, the Court has assumed that the Excessive Bail Clause of the Eighth Amendment applies to the States. See *Schilb* v. *Kuebel*, 404 U. S. 357, 365 (1971). I see no reason to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation, and would hold that the Excessive Fines Clause also applies to the States.

B

In the words of Chief Justice Marshall, a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law." *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819). As such, it is not entitled to "'purely personal' guarantees" whose "'historic function' . . . has been limited to the protection of individuals." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 779, n. 14 (1978). Thus, a corporation has no Fifth Amendment privilege against self-incrimination, *Wilson* v. *United States*, 221 U. S. 361 (1911), or right to privacy, *United States* v. *Morton Salt Co.*, 338 U. S. 632 (1950). On the other hand, a corporation has a First Amendment right to freedom

of speech, *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), and cannot have its property taken without just compensation, *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978). A corporation is also protected from unreasonable searches and seizures, *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978), and can plead former jeopardy as a bar to a prosecution, *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977). Furthermore, a corporation is entitled to due process, *Helicopteros Nacionales de Colombia* v. *Hall*, 466 U. S. 408 (1984), and equal protection, *Metropolitan Life Ins. Co.* v. *Ward*, 470 U. S. 869 (1985), of law.

Whether a particular constitutional guarantee applies to corporations "depends on the nature, history, and purpose" of the guarantee. *First National Bank of Boston, supra*, at 779, n. 14. The payment of monetary penalties, unlike the ability to remain silent, is something that a corporation can do as an entity, and the Court has reviewed fines and monetary penalties imposed on corporations under the Fourteenth Amendment at a time when the Eighth Amendment did not apply to the States. See *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 111–112 (1909). See also *St. Louis I. M. & S. R. Co.* v. *Williams*, 251 U. S. 63, 66–67 (1919). If a corporation is protected by the Due Process Clause from overbearing and oppressive monetary sanctions, it is also protected from such penalties by the Excessive Fines Clause. See *Whitney Stores, Inc.* v. *Summerford*, 280 F. Supp. 406, 411 (SC) (three-judge court) (entertaining Eighth Amendment challenge by corporation to fine for violation of Sunday closing laws), summarily aff'd, 393 U. S. 9 (1968).

II

Language in *Ingraham* v. *Wright*, 430 U. S. 651 (1977), and *Ex parte Watkins*, 7 Pet. 568 (1833), suggests that the *entire* Eighth Amendment is confined to criminal prosecutions and punishments. But as the Court correctly acknowl-

edges, *ante*, at 262–263, and n. 3, that language is not dispositive here.

In *Ingraham*, the Court held that the Cruel and Unusual Punishments Clause of the Eighth Amendment does not apply to disciplinary corporal punishment at a public school. Because the Excessive Fines Clause was not at issue in *Ingraham*, the Court's statement that the "text of the [Eighth] Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government," 430 U. S., at 664, is not controlling. The similar statement in *Ex parte Watkins*, that the Eighth Amendment "is addressed to courts of the United States exercising criminal jurisdiction," 7 Pet., at 573–574, is dictum, for the Court there held only that it did not have appellate jurisdiction to entertain a challenge, by way of a writ for habeas corpus, to criminal fines imposed upon a defendant: "[T]his Court has no appellate jurisdiction to revise the sentences of inferior courts in criminal cases; and cannot, even if the excess of the fine were apparent on the record, reverse the sentence." *Id.*, at 574. There is another reason not to rely on or be guided by the sweeping statements in *Ingraham* and *Ex parte Watkins*. Those statements are inconsistent with the Court's application of the Excessive Bail Clause of the Eighth Amendment to civil proceedings in *Carlson* v. *Landon*, 342 U. S. 524, 544–546 (1952) (immigration and deportation). See *United States* v. *Salerno*, 481 U. S. 739, 754 (1987) (recognizing that *Carlson* "was a civil case"). In sum, none of the Court's precedents foreclose application of the Excessive Fines Clause to punitive damages.

III

The history of the Excessive Fines Clause has been thoroughly canvassed in several recent articles, all of which conclude that the Clause is applicable to punitive damages. See Boston, Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause, 5 Cooley L. Rev.

667 (1988) (Boston); Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons from History, 40 Vand. L. Rev. 1233 (1987) (Massey); Jeffries, A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139 (1986) (Jeffries); Note, The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment, 85 Mich. L. Rev. 1699 (1987) (Note). In my view, a chronological account of the Clause and its antecedents demonstrates that the Clause derives from limitations in English law on monetary penalties exacted in civil *and* criminal cases to punish and deter misconduct. History aside, this Court's cases leave no doubt that punitive damages serve the same purposes—punishment and deterrence—as the criminal law, and that excessive punitive damages present precisely the evil of exorbitant monetary penalties that the Clause was designed to prevent.

A

The story of the Excessive Fines Clause begins in the "early days of English justice, before crime and tort were clearly distinct." Jeffries 154. Under the Saxon legal system in pre-Norman England, the victim of a wrong would, rather than seek vengeance through retaliation or "blood-feud," accept financial compensation for the injury from the wrongdoer. The wrongdoer could also be made to pay an additional sum "on the ground that every evil deed inflicts a wrong on society in general." W. McKechnie, Magna Carta 284–285 (1958) (McKechnie).

At some point after the Norman Conquest in 1066, this method of settling disputes gave way to a system in which individuals who had engaged in conduct offensive to the Crown placed themselves "in the King's mercy" so as not to have to satisfy all the monetary claims against them. *Id.*, at 285. See generally 2 F. Pollock & F. Maitland, The History of English Law 512–516 (2d ed. 1899) (Pollock & Maitland). In order to receive clemency, these individuals were required to pay an "amercement" to the Crown, its representative, or

a feudal lord. *Tumey* v. *Ohio*, 273 U. S. 510, 525 (1927); Massey 1252–1253, and n. 111. But cf. R. Stringham, Magna Carta: Fountainhead of Freedom 40 (1966) (a share of the amercement went to the victim or the victim's family). Because the amercement originated at a time when there was little distinction between criminal law and tort law, it was "neither strictly a civil nor a criminal sanction." Note, at 1716. Blackstone, however, clearly thought that amercements were civil punishments. See 4 W. Blackstone, Commentaries *372 ("amercements for misbehaviour in matters of civil right"). As one commentator has noted, the "amercement was assessed most commonly as a civil sanction for wrongfully bringing or defending a civil lawsuit." Massey 1251. The list of conduct meriting amercement was voluminous: trespass, improper or false pleading, default, failure to appear, economic wrongs, torts, and crimes. See generally *Beecher's Case*, 8 Co. Rep. 58a, 59b–61b, 77 Eng. Rep. 559, 564–567 (Ex. 1609).

The amount of an amercement was set arbitrarily, according to the extent to which the King or his officers "chose to relax the forfeiture of all the offender's goods." Jeffries 154–155. See also Boston 725. Because of the frequency and sometimes abusive nature of amercements, Chapter 20 of Magna Carta, 9 Hen. III, ch. 14 (1225), prohibited amercements that were disproportionate to the offense or that would deprive the wrongdoer of his means of livelihood:

> "A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; and a Merchant likewise, saving to him his Merchandise; and any other's villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy. And none of the said amerciaments shall be assessed, but by the oath of honest and lawful men of the vicinage. Earls and Barons shall not be amerced but by their Peers, and after the manner of their offence. No man of

> the Church shall be amerced after the quantity of his spiritual Benefice, but after his Lay-tenement, and after the quantity of his offence" (numbers omitted).

After Magna Carta, the amount of an amercement was initially set by the court. A group of the amerced party's peers would then be assembled to reduce the amercement in accordance with the party's ability to pay. McKechnie 288–289. For example, in *Le Gras* v. *Bailiff of Bishop of Winchester*, Y. B. Mich. 10 Edw. II, pl. 4 (C. P. 1316), reprinted in 52 Publications of the Selden Society 3, 5 (1934), an amercement for improper civil pleading was vacated, and the bailiff who had imposed the amercement was ordered to "take a moderate amercement proper to the magnitude and manner of that offence." See also Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 845–846 (1969) (Granucci) (listing other examples of amercements that were reduced or set aside).

Fines and amercements had very similar functions. Fines originated in the 13th century as voluntary sums paid to the Crown to avoid an indefinite prison sentence for a common-law crime or to avoid royal displeasure. 2 Pollock & Maitland 517; Massey 1261. The fine operated as a substitute for imprisonment. Having no actual power to impose a fine, the court would sentence the wrongdoer to prison. "To avoid imprisonment, the wrongdoer would then 'make fine' by 'voluntarily' contracting with the Crown to pay money, thereby ending the matter. The Crown gradually eliminated the voluntary nature of the fine by imposing indefinite sentences upon wrongdoers who effectively would be forced to pay the fine. Once the fine was no longer voluntary, it became the equivalent of an amercement." Note, at 1715. See also Boston 719–720. Although in theory fines were voluntary while amercements were not, the purpose of the two penalties was equivalent, and it is not surprising that in practice it became difficult to distinguish the two.

B

By the 17th century, fines had lost their original character of bargain and had replaced amercements as the preferred penal sanction. The word "fine" took on its modern meaning, while the word "amercement" dropped out of ordinary usage. McKechnie 293. But the nomenclature still caused some confusion. See *Griesley's Case*, 8 Co. Rep. 38a, 77 Eng. Rep. 530 (C. P. 1609) ("fine" for refusing to serve as a constable analyzed as an "amercement"). William Shakespeare, an astute observer of English law and politics, did not distinguish between fines and amercements in the plays he wrote in the late 16th century. In Romeo and Juliet, published in 1597, Prince Escalus uses the words "amerce" and "fine" interchangeably in warning the Montagues and the Capulets not to shed any more blood on the streets of Verona:

> "I have an interest in your hate's proceeding,
> My blood for your rude brawls doth lie a-bleeding;
> But I'll amerce you with so strong a fine,
> That you shall all repent the loss of mine."
> Act III, scene 1, lines 186–189.

The preeminence of fines gave courts much more power, for only they could impose fines. Massey 1253. Once it was clear that Magna Carta did not apply to fines for offenses against the Crown, see *John Hampden's Case*, 9 State Tr. 1054, 1126 (K. B. 1684), English courts during the reigns of Charles II and James II took advantage of their newly acquired power and imposed ruinous fines on wrongdoers and critics of the Crown. After James II fled England during the Glorious Revolution of 1688–1689, the House of Commons, in an attempt to end the crisis precipitated by the vacation of the throne, appointed a committee to draft articles concerning essential laws and liberties that would be presented to William of Orange. As the Court correctly notes, some of the men who made up the committee had been subjected to heavy fines by the courts of James II. See gener-

ally L. Schwoerer, The Declaration of Rights, 1689, pp. 30–33, 91–92 (1981) (Schwoerer). The committee ultimately reported 13 Articles to the House of Commons. The final draft of Article 10 provided that "excessive Baile ought not to be required, nor excessive Fines imposed, nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689).

According to Blackstone, the English Bill of Rights was "only declaratory . . . of the old constitutional law." 4 W. Blackstone, Commentaries *372. See also Schwoerer 92 (excessive fines provision of Article 10 "reaffirmed ancient law"). Of course, the only prohibition on excessive monetary penalties predating Article 10 was contained in Magna Carta. "Since it incorporated the earlier prohibition against excessive amercements—which could arise in civil settings—as well as other forms of punishment, [Article 10's limitation on excessive fines] cannot be limited to strictly criminal cases but extends to monetary sanctions imposed in both criminal and civil contexts." Note, at 1717. Because the word "amercement" had dropped out of ordinary usage by the late 17th century, it appears that the word "fine" in Article 10 was simply shorthand for all monetary penalties, "whether imposed by judge or jury, in both civil and criminal proceedings." Massey 1256. Indeed, three months *after* the adoption of the English Bill of Rights, the House of Lords reversed a fine by referring to Magna Carta, and not to Article 10. See *Earl of Devonshire's Case*, 11 State Tr. 1367, 1372 (H. L. 1689) (ruling that "fine" of £30,000 for striking another was "excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land").

The Court argues that Chapter 20 of Magna Carta and Article 10 of the English Bill of Rights were concerned only with limiting governmental abuses of power. Because amercements and fines were paid to the Crown, the Court assumes that governmental abuses can only take place when the sovereign itself exacts a penalty. That assumption, however,

simply recalls the historical accident that, prior to the mid-18th century, monetary sanctions filled the coffers of the King and his barons.

As early as 1275, with the First Statute of Westminster, double and treble damages were allowed by statute. See *ante*, at 274. However, "[i]t was only after the prevalence of the amercement had diminished that the cases began to report the award of punitive damages as a common law entitlement." Massey 1266. One of the first reported cases allowing punitive damages is *Wilkes* v. *Wood*, Lofft. 1, 18–19, 98 Eng. Rep. 489, 498–499 (K. B. 1763): "[A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." The link between the gradual disappearance of the amercement and the emergence of punitive damages provides strong historical support for applying the Excessive Fines Clause to awards of punitive damages. See Boston 728–732.

The case of *Lord Townsend* v. *Hughes*, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994–995 (C. P. 1677), cited by the Court, *ante*, at 268, 272, is not inconsistent with this understanding of history. At the time *Hughes* was decided, damages were understood only as compensation for injury. See T. Blount, Law-Dictionary (1670) (Blount) (unpaginated) (defining "damages" as "a recompense for what the Plaintiff or Demandant *hath suffered*, by means of the wrong done him by the Defendant or Tenant") (emphasis added). *Hughes* involved an action for slander, and the jury was told to award damages for the harm the plaintiff had sustained. The damages awarded were entirely compensatory and did not contain any punitive element whatsoever. Thus, *Hughes* does not stand for the proposition that Magna Carta is inapplicable to punitive damages awarded in civil cases. For the same reasons, neither do the commentaries cited by the Court differentiating between

damages and amercements. See *ante*, at 265, n. 7, 270, n. 13. The damages referred to in those commentaries are compensatory, and not punitive, in nature. See, *e. g.*, Introduction to the Curia Regis Rolls, 1199–1230 A. D., in 62 Publications of the Selden Society 463 (C. Flower ed. 1944) (damages "represented the *loss* incurred by a litigant through an unlawful act") (emphasis added). Amercements and fines were not meant to compensate the injured plaintiff, but rather to punish the wrongdoer and express society's displeasure at the improper act. Compensatory damages, even in Saxon England, had not been limited by Magna Carta, which was meant to ensure that monetary *penalties*, assessed in addition to compensatory sums, have some measure of proportionality.

The Court also points out that in *Rookes* v. *Barnard*, [1964] A. C. 1129, 1221–1231, Lord Devlin, in his extensive discussion of exemplary damages and decision to limit them to certain cases, did not mention either Magna Carta or the Excessive Fines Clause of the English Bill of Rights. *Ante*, at 273, n. 18. Although this is a small point, I think the Court is mistaken to place any reliance on the lack of citation to Magna Carta or the English Bill of Rights in *Rookes*. English courts today need not cite those two documents, for the principles set forth in them are now ingrained as part of the common law. See J. Holt, Magna Carta 2 (1965) ("[I]t is now possible and indeed justifiable for a lawyer to compose a general survey of the freedom of the individual in England without once referring to Magna Carta"). Indeed, English courts have not cited Magna Carta or the English Bill of Rights in cases involving the excessiveness of *criminal* fines. See *Queen* v. *Asif*, 82 Cr. App. R. 123 (1985) (upholding fine of £25,000 for fraudulent evasion of taxes); *Queen* v. *Farenden*, 6 Cr. App. R. (S) 42 (1984) (finding that fine of £250 for first offense of careless driving was "too heavy" and reducing it to £100). Moreover, Lord Devlin noted in *Rookes* that punitive damages could be "used against liberty. Some of the awards that juries have made in the past seem to me to

amount to a greater punishment than would be likely to be incurred if the conduct were criminal . . . . I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used without restraint." [1964] A. C., at 1227. Thus, he suggested that some limits might have to be placed on punitive damages: "It may even be that the House [of Lords] may find it necessary to . . . place some arbitrary limit on awards of damages that are made by way of punishment. Exhortations to be moderate may not be enough." *Id.*, at 1227–1228.

C

There was little debate over the Eighth Amendment in the First Congress, and no discussion of the Excessive Fines Clause. Consideration of the Eighth Amendment immediately followed consideration of the Fifth Amendment. After deciding to confine the benefits of the Self-Incrimination Clause of the Fifth Amendment to criminal proceedings, the Framers turned their attention to the Eighth Amendment. There were no proposals to limit that Amendment to criminal proceedings, and the only discussion was by Mr. Smith of South Carolina and Mr. Livermore of New Hampshire, both of whom thought that the Cruel and Unusual Punishments Clause was too indefinite. See Granucci 842; *Weems* v. *United States*, 217 U. S. 349, 368–369 (1910). Exactly what significance the silence of the Framers has in constitutional interpretation is open to debate, compare, *e. g.*, L. Tribe, Constitutional Choices 42–44 (1985), with, *e. g.*, Powell, Rules for Originalists, 73 Va. L. Rev. 659, 671–672 (1987), but it is not necessary to address that issue here. The Eighth Amendment was based directly on Article I, § 9, of the Virginia Declaration of Rights of 1776, which had in turn adopted verbatim the language of § 10 of the English Bill of Rights. "There can be no doubt that the Declaration of Rights guaranteed at least the liberties and privileges of En-

glishmen." *Solem* v. *Helm*, 463 U. S. 277, 285–286, n. 10 (1983). See also A. Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America 205–207 (1968) (Howard). If anything is apparent from the history set forth above, it is that a monetary penalty in England could be excessive, and that there is a strong link between amercements, which were assessed in civil cases, and fines. Cf. *Solem*, *supra*, at 284, n. 8 (an "amercement was similar to a modern-day fine"). There is, in short, considerable historical support for application of the Excessive Fines Clause to punitive damages.

The Court, however, thinks otherwise, and emphasizes that at the time the Eighth Amendment was enacted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." *Ante*, at 265, and n. 6. In my view, the meaning of that word was much more ambiguous than the Court is willing to concede. In defining the word "fine," some 18th-century dictionaries did not mention to whom the money was paid. See, *e. g.*, T. Sheridan, A Dictionary of the English Language (6th ed. 1796) (unpaginated) ("a mulct [or] a pecuniary punishment"); S. Johnson, A Dictionary of the English Language (7th ed. 1785) (unpaginated) ("a mulct [or] pecuniary punishment," a "penalty," or "money paid for any exemption or liberty"). To the same effect are some 19th-century dictionaries. See, *e. g.*, 1 C. Richardson, A New Dictionary of the English Language 796 (1839) ("any thing (as a sum of money) paid at the end, to make an end, termination or conclusion of a suit, of a prosecution"). That the word "fine" had a broader meaning in the 18th century is also illustrated by the language of § 37 of the Massachusetts Body of Liberties of 1641. That provision granted courts the authority to impose on a *civil* plaintiff who had instituted an improper suit "a proportionable *fine* to the use of the defendant, or accused person." 1 B. Schwartz, The Bill of Rights: A Documentary History 76 (1971) (emphasis added). It is noteworthy that the "fine" was payable to a

private party, and not a governmental entity. Boston 714. In 1646, the Massachusetts General Court ruled that § 37 of the Body of Liberties was based directly on Chapter 20 of Magna Carta. Howard 401, 404.

The Court also finds it significant that, in the 18th and 19th centuries, "fines were assessed in criminal, rather than in private civil, actions." *Ante*, at 265, and n. 7. Again, in my view the Court's recitation of history is not complete. As noted above, § 37 of the Massachusetts Body of Liberties required that "fines" payable to private litigants in civil cases be proportional. Furthermore, not all 17th-century sources unequivocally linked fines with criminal proceedings. See Blount ("fine" is "*sometimes* an amends, pecuniary punishment, or recompence upon an offence committed against the King, and his laws, or a Lord of a Mannor") (emphasis added). Nor did all American courts in the 19th century view "fines" as exclusively criminal. The Massachusetts Supreme Judicial Court held that the word "fine" in a statute meant "forfeitures and penalties recoverable in civil actions, as well as pecuniary punishments inflicted by sentence." *Hanscomb* v. *Russell*, 77 Mass. 373, 375 (1858). It explained that "the word 'fine' has other meanings" besides pecuniary penalties "inflicted by sentence of a court in the exercise of criminal jurisdiction . . . as appears by most of the dictionaries of our language, where it is defined not only as a pecuniary punishment, but also as a forfeiture, a penalty, [etc.]" *Id.*, at 374–375. The Iowa Supreme Court had the following to say about fines: "The terms, fine, forfeiture, and penalty, are often used loosely, and even confusedly . . . . A fine is a pecuniary penalty, and is commonly (perhaps always) to be collected by suit in *some* form. A 'forfeiture' is a penalty by which one loses his rights and interest in his property." *Gosselink* v. *Campbell*, 4 Iowa 296, 300 (1856) (emphasis added). Hence, around the time of the framing and enactment of the Eighth Amendment some courts and

commentators believed that the word "fine" encompassed civil penalties.

D

In my view, the $6 million award of punitive damages imposed on BFI constitutes a fine subject to the limitations of the Eighth Amendment. In current usage, the word "fine" comprehends a forfeiture or penalty recoverable in a civil action. See Black's Law Dictionary 569 (5th ed. 1979); Webster's Third New International Dictionary 852 (1971). Not only is that understanding supported by the history set forth above, it is buttressed by this Court's precedents. Punitive damages are "*private fines* levied by civil juries." *Electrical Workers* v. *Foust*, 442 U. S. 42, 48 (1979) (emphasis added). They are not awarded to compensate for injury, but rather to further the aims of the criminal law: "'to punish reprehensible conduct and to deter its future occurrence.'" *Bankers Life & Casualty Co.*, 486 U. S., at 87 (O'CONNOR, J., concurring in part and concurring in judgment). See also Restatement (Second) of Torts § 908(1) (1979). Their role therefore "runs counter to the normal reparative function of tort and contract remedies." K. Redden, Punitive Damages § 2.1, p. 24 (1980). The Court's cases abound with the recognition of the penal nature of punitive damages. See *Tull* v. *United States*, 481 U. S. 412, 422, and n. 7 (1987); *Memphis Community School District* v. *Stachura*, 477 U. S. 299, 306, n. 9 (1986); *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 260–261 (1984) (BLACKMUN, J., dissenting); *Smith* v. *Wade*, 461 U. S. 30, 59 (1983) (REHNQUIST, J., dissenting); *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266–267 (1981); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974); *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 82 (1971) (MARSHALL, J., dissenting); *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 101, 107 (1893).

This plethora of case law on the nature of punitive damages, it seems to me, is sufficient to find the Excessive Fines Clause applicable to the award in this case. There is, how-

ever, even more support for the applicability of the Clause. In determining whether a sanction is penal, the Court has generally looked to several factors: (1) whether it involves an affirmative disability; (2) whether it has historically been regarded as punishment; (3) whether it comes into play on a finding of scienter; (4) whether its operation will promote retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether there is an alternative purpose for it; and (7) whether it is excessive in relation to the alternative purpose assigned. *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963). I agree with those commentators who have found it easy to conclude that punitive damages are penal under the *Mendoza-Martinez* factors. See, *e. g.*, Grass, The Penal Dimensions of Punitive Damages, 12 Hastings L. Q. 241 (1985).

The character of a sanction imposed as punishment "is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *United States* v. *Chouteau*, 102 U. S. 603, 611 (1881). As the Court wrote only recently, "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment." *United States* v. *Halper*, 490 U. S. 435, 448 (1989) (emphasis added). In order to evade the teachings of cases like *Choteau* and *Halper*, the Court determines that the Excessive Fines Clause becomes relevant only when some governmental entity is seeking to reap the benefits of a monetary sanction. *Ante*, at 275–276. I disagree with the Court's formalistic analysis. A governmental entity can abuse its power by allowing civil juries to impose ruinous punitive damages as a way of furthering the purposes of its criminal law. Cf. *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 937 (1982). I also note that by relying so heavily on the distinction between governmental involvement and purely private suits, the Court suggests (despite its claim, *ante*, at 275–276, n. 21, that it leaves the question open) that

the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity. See, *e. g.*, Fla. Stat. § 768.73(2)(b) (1987) (60% of any award of punitive damages is payable to the State).

As far as I know, the applicability of a provision of the Constitution has never depended on the vagaries of state or federal law, and in *Missouri Pacific R. Co.* v. *Humes*, 115 U. S. 512 (1885), the Court stressed the constitutional insignificance of how a monetary sanction is administered or by whom it is recovered. *Humes* involved a state statute providing for double damages to any individual who suffered harm due to a railroad's failure to maintain fences and cattle guards. In holding that the double damages provision did not violate the Fourteenth Amendment, *id.*, at 522–523, the Court said:

> "The additional damages being by way of punishment, . . . it is not a valid objection that the sufferer instead of the State receives them. . . . The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion."

Humes teaches that the identity of the recipient of a monetary penalty is irrelevant for purposes of determining the constitutional validity of the penalty. From the standpoint of the defendant who has been forced to pay an excessive monetary sanction, it hardly matters what disposition is made of the award.

IV

The only remaining question is whether the award of over $6 million in this case is "excessive" within the meaning of the Eighth Amendment.

A

Using economic analysis, some of the *amici* in support of BFI argue that the wealth of a defendant should not, as a constitutional matter, be taken into account in setting the amount of an award of punitive damages. See, *e. g.*, Brief for Navistar International Transportation Corp. as *Amicus Curiae* 9–25. It seems to me that this argument fails because the Excessive Fines Clause is only a substantive ceiling on the *amount* of a monetary sanction, and not an economic primer on what factors best further the goals of punishment and deterrence. Just as the Fourteenth Amendment does not enact Herbert Spencer's Social Statics, see *Lochner* v. *New York*, 198 U. S. 45, 75 (1905) (Holmes, J., dissenting), the Eighth Amendment does not incorporate the views of the Law and Economics School. The "Constitution does not require the States to subscribe to any particular economic theory." *CTS Corp.* v. *Dynamics Corp. of America*, 481 U. S. 69, 92 (1987). Moreover, as a historical matter, the argument is weak indeed. First, Magna Carta only required that an amercement be proportionate and not destroy a person's livelihood. Second, Blackstone remarked that the "*quantum*, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and at all events, what is ruin to one man's fortune, may be a matter of indifference to another's." 4 W. Blackstone, Commentaries *371.

B

Determining whether a particular award of punitive damages is excessive is not an easy task. The proportionality framework that the Court has adopted under the Cruel and Unusual Punishments Clause, however, offers some broad guidelines. See *Solem*, 463 U. S., at 290–292. Cf. *United States* v. *Busher*, 817 F. 2d 1409, 1415 (CA9 1987) (applying *Solem* factors to civil forfeiture under RICO). I would adapt the *Solem* framework to punitive damages in the following

manner. First, the reviewing court must accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue. Second, the court should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages. Third, because punitive damages are penal in nature, the court should compare the civil *and* criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil *and* criminal penalties imposed by different jurisdictions for the same or similar conduct. In identifying the relevant civil penalties, the court should consider not only the amount of awards of punitive damages but also statutory civil sanctions. In identifying the relevant criminal penalties, the court should consider not only the possible monetary sanctions, but also any possible prison term.

The Court of Appeals did not think that the Excessive Fines Clause applied to awards of punitive damages, 845 F. 2d, at 410, and therefore did not conduct any sort of proportionality analysis. I would remand the case to the Court of Appeals so that it could, in the first instance, apply the *Solem* framework set forth above and determine whether the award of over $6 million imposed on BFI violates the Excessive Fines Clause.

PENRY *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87-6177. Argued January 11, 1989—Decided June 26, 1989

Petitioner was charged with capital murder in Texas state court. He was found competent to stand trial, although a psychologist testified that he was mildly to moderately retarded and had the mental age of a 6½-year-old. At the guilt-innocence phase of the trial, petitioner raised an insanity defense and presented psychiatric testimony that he suffered from a combination of organic brain damage and moderate retardation which resulted in poor impulse control and an inability to learn from experience. His evidence also indicated that he had been abused as a child. The State introduced testimony that petitioner was legally sane but had an antisocial personality. The jury rejected petitioner's insanity defense and found him guilty of capital murder. At the penalty phase of the trial, the sentencing jury was instructed to consider all the evidence introduced at trial in answering the following "special issues": (1) whether petitioner's conduct was committed deliberately and with the reasonable expectation that death would result; (2) whether there was a probability that he would be a continuing threat to society; and (3) whether the killing was unreasonable in response to any provocation by the victim. The trial court rejected petitioner's request for jury instructions defining the terms in the special issues and authorizing a grant of mercy based upon the existence of mitigating circumstances. The jury answered "yes" to each special issue, and, as required by Texas law, the court therefore sentenced petitioner to death. A "no" answer to any of the special issues would have required a sentence of life imprisonment. The Texas Court of Criminal Appeals affirmed, rejecting petitioner's contentions that his death sentence violated the Eighth Amendment first, because the jury was not adequately instructed to consider all of his mitigating evidence and because the special issues' terms were not defined in such a way that the jury could consider and give effect to that evidence in answering them; and, second, because it is cruel and unusual punishment to execute a mentally retarded person with petitioner's mental ability. After this Court denied certiorari on direct review, the Federal District Court and the Court of Appeals upheld petitioner's death sentence in habeas corpus proceedings. Although it denied him relief, the Court of Appeals nevertheless found considerable merit in petitioner's claim that

his mitigating evidence of mental retardation and childhood abuse could not be given effect by the jury, under the instructions given, in answering the special issues.

Held: The judgment is affirmed in part and reversed in part, and the case is remanded.

832 F. 2d 915, affirmed in part, reversed in part, and remanded.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, II–A, II–B, III, IV–A, and IV–B, concluding that:

1. Granting petitioner relief on his claim that when mitigating evidence of mental retardation and an abused childhood is presented, Texas juries must, upon request, be given instructions that allow them to give effect to that mitigating evidence in determining whether to impose the death penalty, would not create a "new rule" which, under *Teague* v. *Lane*, 489 U. S. 288, 301, may not generally be applied or announced in cases on collateral review. Pp. 313–319.

(a) The *Teague* rule of nonretroactivity and its two exceptions are applicable in the capital sentencing context. A criminal judgment includes the sentence imposed, and collateral challenges to sentences foster delay and undermine the finality concerns underlying *Teague*'s rule of nonretroactivity. Pp. 313–314.

(b) Under *Teague*, a case announces a "new rule" when it breaks new ground or imposes a new obligation on the States or the Federal Government, or if the result is not dictated by precedent which existed at the time the defendant's conviction became final. 489 U. S., at 301. Here, since *Lockett* v. *Ohio*, 438 U. S. 586, and *Eddings* v. *Oklahoma*, 455 U. S. 104, were decided before petitioner's conviction became final when this Court denied his certiorari petition on direct review, he is entitled to the benefit of those decisions under *Griffith* v. *Kentucky*, 479 U. S. 314. The rule that petitioner seeks does not impose a new obligation on Texas because *Jurek* v. *Texas*, 428 U. S. 262, upheld the Texas death penalty statute on the basis of assurances that the special issues would be interpreted broadly enough to permit the jury to consider all of the relevant mitigating evidence a defendant might present in imposing sentence. Moreover, the rule that petitioner seeks in this case is dictated by *Eddings* and *Lockett*, which established that a State cannot, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigates against imposing the death penalty. Pp. 314–319.

2. The absence of instructions informing the jury that it could consider and give effect to petitioner's mitigating evidence of mental retardation and abused background by declining to impose the death penalty

compels the conclusion that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision, as is required by the Eighth and Fourteenth Amendments under *Lockett*, *Eddings*, and subsequent decisions. Those decisions are based on the principle that punishment must be directly related to the defendant's personal culpability, and that a defendant who commits crimes attributable to a disadvantaged background or emotional and mental problems may be less culpable than one who has no such excuse. Here, although petitioner was permitted to introduce and argue the significance of his mitigating evidence to the jury, the jury instructions did not permit the jury to give effect to that evidence in answering the three special issues. As to the first such issue, without a special instruction defining "deliberately" in a way that would clearly direct the jury to fully consider petitioner's mitigating evidence as it bears on his moral culpability, a juror who believed that that evidence made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that petitioner committed the crime "deliberately." Nor did the second special issue provide a vehicle for the jury to give mitigating effect to petitioner's evidence of mental retardation and childhood abuse; to the contrary, the evidence concerning his inability to learn from his mistakes by virtue of his mental retardation actually suggests that he will be dangerous in the future. Although such evidence may lessen his blameworthiness, it made an affirmative answer to the second issue more likely. Furthermore, a juror who believed that petitioner lacked the moral culpability to be sentenced to death could not express that view in answering the third special issue if the juror also believed that his conduct was not a reasonable response to provocation by the victim. There is no merit to the State's contention that to instruct the jury that it could decline to impose the death penalty based on petitioner's mitigating evidence would allow it the sort of unbridled discretion prohibited by *Furman* v. *Georgia*, 408 U. S. 238. As *Gregg* v. *Georgia*, 428 U. S. 153, made clear, so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant. Furthermore, because the punishment imposed should be directly related to the personal culpability of the defendant, the sentencer must be allowed to consider and give effect to mitigating evidence relevant to a defendant's background, character, and crime. Full consideration of such mitigating evidence enhances the reliability of the jury's sentencing decision. Pp. 319–328.

3. The Eighth Amendment does not categorically prohibit the execution of mentally retarded capital murderers of petitioner's reasoning ability. Pp. 328–335.

(a) Although granting petitioner relief on this issue would create a "new rule" within the meaning of *Teague*, *supra*, that rule would fall within the first exception to *Teague*'s general rule of nonretroactivity. That exception applies not only to new rules that place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. It also applies to new rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. Cf., *e. g.*, *Ford* v. *Wainwright*, 477 U. S. 399, 410. Pp. 329–330.

(b) The Eighth Amendment's categorical prohibition upon the infliction of cruel and unusual punishment applies to practices condemned by the common law at the time the Bill of Rights was adopted, as well as to punishments which offend our society's evolving standards of decency as expressed in objective evidence of legislative enactments and the conduct of sentencing juries. Since the common law prohibited the punishment of "idiots"—which term was generally used to describe persons totally lacking in reason, understanding, or the ability to distinguish between good and evil—it may indeed be "cruel and unusual punishment" to execute persons who are profoundly or severely retarded and wholly lacking in the capacity to appreciate the wrongfulness of their actions. Such persons, however, are not likely to be convicted or face the prospect of punishment today, since the modern insanity defense generally includes "mental defect" as part of the legal definition of insanity, and since *Ford* v. *Wainwright*, *supra*, prohibits the execution of persons who are unaware of their punishment and why they must suffer it. Moreover, petitioner is not such a person, since the jury (1) found him competent to stand trial and therefore to have a rational as well as factual understanding of the proceedings; and (2) rejected his insanity defense, thereby reflecting the conclusion that he knew his conduct was wrong and was capable of conforming it to the requirements of law. Nor is there sufficient objective evidence today of a national consensus against executing mentally retarded capital murderers, since petitioner has cited only one state statute that explicitly bans that practice and has offered no evidence of the general behavior of juries in this regard. Opinion surveys indicating strong public opposition to such executions do not establish a societal consensus, absent some legislative reflection of the sentiment expressed therein. Pp. 330–335.

JUSTICE O'CONNOR concluded in Part IV–C that, on the present record, it cannot be said that executing capital murderers who are mentally retarded violates the Eighth Amendment's proportionality requirement.

To be sure, retardation has long been regarded as a factor that may diminish culpability, and, in its most severe form, may result in complete exculpation. Moreover, most States with death penalty statutes that list mitigating factors include reduced mental capacity as a mitigating circumstance, and this Court holds today that the sentencing body must be allowed to consider retardation in making the individualized determination whether the death penalty is appropriate. Mentally retarded persons, however, are individuals whose abilities and behavioral deficits can vary greatly depending on the degree of their retardation, their life experience, and the ameliorative effects of education and habilitation. On the present record, it cannot be said that all mentally retarded people of petitioner's ability—by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty. Moreover, the concept of "mental age" is an insufficient basis for a categorical Eighth Amendment rule, since it is imprecise, does not adequately account for individuals' varying experiences and abilities, ceases to change after a person reaches the chronological age of 15 or 16, and could have a disempowering effect if applied to retarded persons in other areas of the law, such as the opportunity to enter contracts or to marry. Pp. 335–340.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Parts I and IV–A, the opinion of the Court with respect to Parts II–B and III, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, the opinion of the Court with respect to Parts II–A and IV–B, in which REHNQUIST, C. J., and WHITE, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Part IV–C. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 341. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN, J., joined, *post*, p. 349. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., and WHITE and KENNEDY, JJ., joined, *post*, p. 350.

Curtis C. Mason argued the cause and filed briefs for petitioner.

Charles A. Palmer, Assistant Attorney General of Texas, argued the cause for respondent. With him on the briefs were *Jim Mattox*, Attorney General, *Mary F. Keller*, First Assistant Attorney General, *Lou McCreary*, Executive As-

sistant Attorney General, and *Michael P. Hodge* and *William C. Zapalac*, Assistant Attorneys General.*

JUSTICE O'CONNOR delivered the opinion of the Court, except as to Part IV–C.

In this case, we must decide whether petitioner, Johnny Paul Penry, was sentenced to death in violation of the Eighth Amendment because the jury was not instructed that it could consider and give effect to his mitigating evidence in imposing its sentence. We must also decide whether the Eighth Amendment categorically prohibits Penry's execution because he is mentally retarded.

I

On the morning of October 25, 1979, Pamela Carpenter was brutally raped, beaten, and stabbed with a pair of scissors in her home in Livingston, Texas. She died a few hours later in the course of emergency treatment. Before she died, she described her assailant. Her description led two local sheriff's deputies to suspect Penry, who had recently been released on parole after conviction on another rape charge. Penry subsequently gave two statements confessing to the crime and was charged with capital murder.

At a competency hearing held before trial, a clinical psychologist, Dr. Jerome Brown, testified that Penry was mentally retarded. As a child, Penry was diagnosed as having organic brain damage, which was probably caused by trauma to the brain at birth. App. 34–35. Penry was tested over the years as having an IQ between 50 and 63, which indicates

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*Briefs of *amici curiae* urging reversal were filed for the American Association on Mental Retardation et al. by *James W. Ellis*, *Ruth Luckasson*, *Barbara Bergman*, and *Donald N. Bersoff*; for the Texas Criminal Defense Lawyers Association by *David Botsford*, *Mark Stevens*, and *Carolyn Garcia*; and for Billy Conn Gardner by *Eugene O. Duffy* and *Christine M. Wiseman*.

Stanley G. Schneider filed a brief for the Harris County Criminal Lawyers Association as *amicus curiae*.

mild to moderate retardation.[1] *Id.*, at 36–38, 55. Dr. Brown's own testing before the trial indicated that Penry had an IQ of 54. Dr. Brown's evaluation also revealed that Penry, who was 22 years old at the time of the crime, had the mental age of a 6½-year-old, which means that "he has the ability to learn and the learning or the knowledge of the average 6½ year old kid." *Id.*, at 41. Penry's social maturity, or ability to function in the world, was that of a 9- or 10-year-old. Dr. Brown testified that "there's a point at which anyone with [Penry's] IQ is always incompetent, but, you know, this man is more in the borderline range." *Id.*, at 47.

The jury found Penry competent to stand trial. *Id.*, at 20–24. The guilt-innocence phase of the trial began on March 24, 1980. The trial court determined that Penry's confessions were voluntary, and they were introduced into evidence. At trial, Penry raised an insanity defense and presented the testimony of a psychiatrist, Dr. Jose Garcia. Dr. Garcia testified that Penry suffered from organic brain damage and moderate retardation, which resulted in poor impulse control and an inability to learn from experience. *Id.*, at 18, 19, 87–90. Dr. Garcia indicated that Penry's brain damage was probably caused at birth, *id.*, at 106, but may have been caused by beatings and multiple injuries to the

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[1] Persons who are mentally retarded are described as having "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." American Association on Mental Deficiency (now Retardation) (AAMR), Classification in Mental Retardation 1 (H. Grossman ed. 1983). To be classified as mentally retarded, a person generally must have an IQ of 70 or below. *Id.*, at 11. Under the AAMR classification system, individuals with IQ scores between 50–55 and 70 have "mild" retardation. Individuals with scores between 35–40 and 50–55 have "moderate" retardation. "Severely" retarded people have IQ scores between 20–25 and 35–40, and "profoundly" retarded people have scores below 20 or 25. *Id.*, at 13. Approximately 89% of retarded persons are "mildly" retarded. Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 423 (1985).

brain at an early age. *Id.*, at 18, 90. In Dr. Garcia's judgment, Penry was suffering from an organic brain disorder at the time of the offense which made it impossible for him to appreciate the wrongfulness of his conduct or to conform his conduct to the law. *Id.*, at 86–87.

Penry's mother testified at trial that Penry was unable to learn in school and never finished the first grade. Penry's sister testified that their mother had frequently beaten him over the head with a belt when he was a child. Penry was also routinely locked in his room without access to a toilet for long periods of time. *Id.*, at 124, 126, 127. As a youngster, Penry was in and out of a number of state schools and hospitals, until his father removed him from state schools altogether when he was 12. *Id.*, at 120. Penry's aunt subsequently struggled for over a year to teach Penry how to print his name. *Id.*, at 133.

The State introduced the testimony of two psychiatrists to rebut the testimony of Dr. Garcia. Dr. Kenneth Vogtsberger testified that although Penry was a person of limited mental ability, he was not suffering from any mental illness or defect at the time of the crime, and that he knew the difference between right and wrong and had the potential to honor the law. *Id.*, at 144–145. In his view, Penry had characteristics consistent with an antisocial personality, including an inability to learn from experience and a tendency to be impulsive and to violate society's norms. *Id.*, at 149–150. He testified further that Penry's low IQ scores underestimated his alertness and understanding of what went on around him. *Id.*, at 146.

Dr. Felix Peebles also testified for the State that Penry was legally sane at the time of the offense and had a "full-blown anti-social personality." *Id.*, at 171. In addition, Dr. Peebles testified that he personally diagnosed Penry as being mentally retarded in 1973 and again in 1977, and that Penry "had a very bad life generally, bringing up." *Id.*, at 168–169. In Dr. Peebles' view, Penry "had been socially and

emotionally deprived and he had not learned to read and write adequately." *Id.*, at 169. Although they disagreed with the defense psychiatrist over the extent and cause of Penry's mental limitations, both psychiatrists for the State acknowledged that Penry was a person of extremely limited mental ability, and that he seemed unable to learn from his mistakes. *Id.*, at 149, 172–173.

The jury rejected Penry's insanity defense and found him guilty of capital murder. Tex. Penal Code Ann. § 19.03 (1974 and Supp. 1989). The following day, at the close of the penalty hearing, the jury decided the sentence to be imposed on Penry by answering three "special issues":

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon 1981 and Supp. 1989).

If the jury unanimously answers "yes" to each issue submitted, the trial court must sentence the defendant to death. Arts. 37.071(c)–(e). Otherwise, the defendant is sentenced to life imprisonment. *Ibid.*

Defense counsel raised a number of objections to the proposed charge to the jury. With respect to the first special issue, he objected that the charge failed to define the term "deliberately." App. 210. With respect to the second special issue, he objected that the charge failed to define the terms "probability," "criminal acts of violence," and "continuing threat to society." *Id.*, at 210–211. Defense counsel

also objected to the charge because it failed to "authorize a discretionary grant of mercy based upon the existence of mitigating circumstances" and because it "fail[ed] to require as a condition to the assessment of the death penalty that the State show beyond a reasonable doubt that any aggravating circumstances found to exist outweigh any mitigating circumstances." *Id.*, at 211. In addition, the charge failed to instruct the jury that it may take into consideration all of the evidence whether aggravating or mitigating in nature which was submitted in the full trial of the case. *Id.*, at 212. Defense counsel also objected that, in light of Penry's mental retardation, permitting the jury to assess the death penalty in this case amounted to cruel and unusual punishment prohibited by the Eighth Amendment. *Id.*, at 211.

These objections were overruled by the trial court. The jury was then instructed that the State bore the burden of proof on the special issues, and that before any issue could be answered "yes," all 12 jurors must be convinced by the evidence beyond a reasonable doubt that the answer to that issue should be "yes." *Id.*, at 25. The jurors were further instructed that in answering the three special issues, they could consider all the evidence submitted in both the guilt-innocence phase and the penalty phase of the trial. *Id.*, at 26. The jury charge then listed the three questions, with the names of the defendant and the deceased inserted.

The jury answered "yes" to all three special issues, and Penry was sentenced to death. The Texas Court of Criminal Appeals affirmed his conviction and sentence on direct appeal. *Penry* v. *State*, 691 S. W. 2d 636 (1985). That court held that terms such as "deliberately," "probability," and "continuing threat to society" used in the special issues need not be defined in the jury charge because the jury would know their common meaning. *Id.*, at 653–654. The court concluded that Penry was allowed to present all relevant mitigating evidence at the punishment hearing, and that there was no constitutional infirmity in failing to

require the jury to find that aggravating circumstances outweighed mitigating ones or in failing to authorize a discretionary grant of mercy based upon the existence of mitigating circumstances. *Id.*, at 654. The court also held that imposition of the death penalty was not prohibited by virtue of Penry's mental retardation. *Id.*, at 654–655. This Court denied certiorari on direct review. *Sub nom. Penry* v. *Texas*, 474 U. S. 1073 (1986).

Penry then filed this federal habeas corpus petition challenging his death sentence. Among other claims, Penry argued that he was sentenced in violation of the Eighth Amendment because the trial court failed to instruct the jury on how to weigh mitigating factors in answering the special issues and failed to define the term "deliberately." Penry also argued that it was cruel and unusual punishment to execute a mentally retarded person. The District Court denied relief, App. 234–273, and Penry appealed to the Court of Appeals for the Fifth Circuit.

The Court of Appeals affirmed the District Court's judgment. 832 F. 2d 915 (1987). The court stressed, however, that it found considerable merit in Penry's claim that the jury was not allowed to consider and apply all of his personal mitigating circumstances in answering the Texas special issues. Although the jury was presented with evidence that might mitigate Penry's personal culpability for the crime, such as his mental retardation, arrested emotional development, and abused background, the jury could not give effect to that evidence by mitigating Penry's sentence to life imprisonment. "Having said that it was a deliberate murder and that Penry will be a continuing threat, the jury can say no more." *Id.*, at 920. In short, the court did not see how Penry's mitigating evidence, under the instructions given, could be fully acted upon by the jury because "[t]here is no place for the jury to say 'no' to the death penalty" based on the mitigating force of those circumstances. *Id.*, at 925. Although the court questioned whether Penry was given the individual-

ized sentencing that the Constitution requires, it ultimately concluded that prior Circuit decisions required it to reject Penry's claims. *Id.*, at 926. The court also rejected Penry's contention that it was cruel and unusual punishment to execute a mentally retarded person such as himself. *Id.*, at 918 (citing *Brogdon* v. *Butler*, 824 F. 2d 338, 341 (CA5 1987)).

We granted certiorari to resolve two questions. 487 U. S. 1233 (1988). First, was Penry sentenced to death in violation of the Eighth Amendment because the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering them? Second, is it cruel and unusual punishment under the Eighth Amendment to execute a mentally retarded person with Penry's reasoning ability?

II

A

Penry is currently before the Court on his petition in federal court for a writ of habeas corpus. Because Penry is before us on collateral review, we must determine, as a threshold matter, whether granting him the relief he seeks would create a "new rule." *Teague* v. *Lane*, 489 U. S. 288, 301 (1989). Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions. *Id.*, at 311–313.

Teague was not a capital case, and the plurality opinion expressed no views regarding how the retroactivity approach adopted in *Teague* would be applied in the capital sentencing context. *Id.*, at 314, n. 2. The plurality noted, however, that a criminal judgment necessarily includes the sentence imposed, and that collateral challenges to sentences "delay the enforcement of the judgment at issue and decrease the possibility that 'there will at some point be the certainty that comes with an end to litigation.'" *Ibid.* (quoting *Sanders* v.

United States, 373 U. S. 1, 25 (1963) (Harlan, J., dissenting)). See also *Mackey* v. *United States*, 401 U. S. 667, 690–695 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). In our view, the finality concerns underlying Justice Harlan's approach to retroactivity are applicable in the capital sentencing context, as are the two exceptions to his general rule of nonretroactivity. See *Teague*, *supra*, at 311–313.

B

As we indicated in *Teague*, "[i]n general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." 489 U. S., at 301. Or, "[t]o put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Ibid.* (emphasis in original). *Teague* noted that "[i]t is admittedly often difficult to determine when a case announces a new rule." *Ibid.* Justice Harlan recognized "the inevitable difficulties that will arise in attempting 'to determine whether a particular decision has really announced a "new" rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.'" *Mackey*, *supra*, at 695 (opinion concurring in judgments in part and dissenting in part) (quoting *Desist* v. *United States*, 394 U. S. 244, 263 (1969) (Harlan, J., dissenting)). See generally *Yates* v. *Aiken*, 484 U. S. 211, 216–217 (1988) (concluding that *Francis* v. *Franklin*, 471 U. S. 307 (1985), did not announce a new rule but was "merely an application of the principle that governed our decision in *Sandstrom* v. *Montana*, [442 U. S. 510 (1979),] which had been decided before petitioner's trial took place").

Penry's conviction became final on January 13, 1986, when this Court denied his petition for certiorari on direct review of his conviction and sentence. *Sub nom. Penry* v. *Texas*, *supra*. This Court's decisions in *Lockett* v. *Ohio*, 438 U. S.

586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), were rendered before his conviction became final. Under the retroactivity principles adopted in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), Penry is entitled to the benefit of those decisions. Citing *Lockett* and *Eddings*, Penry argues that he was sentenced to death in violation of the Eighth Amendment because, in light of the jury instructions given, the jury was unable to fully consider and give effect to the mitigating evidence of his mental retardation and abused background, which he offered as the basis for a sentence less than death. Penry thus seeks a rule that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether a defendant should be sentenced to death. We conclude, for the reasons discussed below, that the rule Penry seeks is not a "new rule" under *Teague*.

Penry does not challenge the facial validity of the Texas death penalty statute, which was upheld against an Eighth Amendment challenge in *Jurek* v. *Texas*, 428 U. S. 262 (1976). Nor does he dispute that some types of mitigating evidence can be fully considered by the sentencer in the absence of special jury instructions. See *Franklin* v. *Lynaugh*, 487 U. S. 164, 175 (1988) (plurality opinion); *id.*, at 185–186 (O'CONNOR, J., concurring in judgment). Instead, Penry argues that, on the facts of this case, the jury was unable to fully consider and give effect to the mitigating evidence of his mental retardation and abused background in answering the three special issues. In our view, the relief Penry seeks does not "impos[e] a new obligation" on the State of Texas. *Teague*, *supra*, at 301. Rather, Penry simply asks the State to fulfill the assurance upon which *Jurek* was based: namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence.

In *Jurek*, the joint opinion of Justices Stewart, Powell, and STEVENS noted that the Texas statute narrowed the circumstances in which the death penalty could be imposed to five categories of murders. 428 U. S., at 268. Thus, although Texas had not adopted a list of statutory aggravating factors that the jury must find before imposing the death penalty, "its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose," *id.*, at 270, and effectively "requires the sentencing authority to focus on the particularized nature of the crime." *Id.*, at 271. To provide the individualized sentencing determination required by the Eighth Amendment, however, the sentencer must be allowed to consider mitigating evidence. *Ibid.* Indeed, as *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), made clear, "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*, at 304 (plurality opinion).

Because the Texas death penalty statute does not explicitly mention mitigating circumstances, but rather directs the jury to answer three questions, *Jurek* reasoned that the statute's constitutionality "turns on whether the enumerated questions allow consideration of particularized mitigating factors." 428 U. S., at 272. Although the various terms in the special questions had yet to be defined, the joint opinion concluded that the sentencing scheme satisfied the Eighth Amendment on the assurance that the Texas Court of Criminal Appeals would interpret the question concerning future dangerousness so as to allow the jury to consider whatever mitigating circumstances a defendant may be able to show, including a defendant's prior criminal record, age, and mental or emotional state. *Id.*, at 272–273.

Our decisions subsequent to *Jurek* have reaffirmed that the Eighth Amendment mandates an individualized assessment of the appropriateness of the death penalty. In *Lockett* v. *Ohio*, 438 U. S. 586 (1978), a plurality of this Court held that the Eighth and Fourteenth Amendments require that the sentencer "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original). Thus, the Court held unconstitutional the Ohio death penalty statute which mandated capital punishment upon a finding of one aggravating circumstance unless one of three statutory mitigating factors were present.

Lockett underscored *Jurek*'s recognition that the constitutionality of the Texas scheme "turns on whether the enumerated questions allow consideration of particularized mitigating factors." *Jurek*, *supra*, at 272. The plurality opinion in *Lockett* indicated that the Texas death penalty statute had "survived the petitioner's Eighth and Fourteenth Amendment attack [in *Jurek*] because three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question—despite its facial narrowness—so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show." 438 U. S., at 607. Thus, the *Lockett* plurality noted that neither the Texas statute upheld in 1976 nor the statutes that had survived facial challenges in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), and *Proffitt* v. *Florida*, 428 U. S. 242 (1976), "clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." *Lockett*, *supra*, at 607. Cf. *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987) (sustaining "as applied" challenge to Florida death penalty statute); *Godfrey*

v. *Georgia*, 446 U. S. 420 (1980) (sustaining "as applied" challenge to Georgia death penalty statute).

In *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), a majority of the Court reaffirmed that a sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death. In *Eddings*, the Oklahoma death penalty statute permitted the defendant to introduce evidence of any mitigating circumstance, but the sentencing judge concluded, as a matter of law, that he was unable to consider mitigating evidence of the youthful defendant's troubled family history, beatings by a harsh father, and emotional disturbance. Applying *Lockett*, we held that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." 455 U. S., at 113–114 (emphasis in original). In that case, "it was as if the trial judge had instructed a jury to disregard the mitigating evidence [the defendant] proffered on his behalf." *Id.*, at 114.

Thus, at the time Penry's conviction became final, it was clear from *Lockett* and *Eddings* that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty. Moreover, the facial validity of the Texas death penalty statute had been upheld in *Jurek* on the basis of assurances that the special issues would be interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence a defendant might present. Penry argues that those assurances were not fulfilled *in his particular case* because, without appropriate instructions, the jury could not fully consider and give effect to the mitigating evidence of his mental retardation and abused childhood in rendering its sentencing decision. The rule

Penry seeks—that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed— is not a "new rule" under *Teague* because it is dictated by *Eddings* and *Lockett*. Moreover, in light of the assurances upon which *Jurek* was based, we conclude that the relief Penry seeks does not "impos[e] a new obligation" on the State of Texas. *Teague*, 489 U. S., at 301.

III

Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring). Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. *Hitchcock* v. *Dugger*, *supra*. Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence. *Woodson*, 428 U. S., at 304, 305. "Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *California* v. *Brown*, *supra*, at 545 (O'CONNOR, J., concurring) (emphasis in original).

Although Penry offered mitigating evidence of his mental retardation and abused childhood as the basis for a sentence of life imprisonment rather than death, the jury that sentenced him was only able to express its views on the appropriate sentence by answering three questions: Did Penry act deliberately when he murdered Pamela Carpenter? Is there a probability that he will be dangerous in the future? Did he act unreasonably in response to provocation? The jury was never instructed that it could consider the evidence offered by Penry as *mitigating* evidence and that it could give mitigating effect to that evidence in imposing sentence.

Like the petitioner in *Franklin* v. *Lynaugh*, Penry contends that in the absence of his requested jury instructions, the Texas death penalty statute was applied in an unconstitutional manner by precluding the jury from acting upon the particular mitigating evidence he introduced. *Franklin* was the first case considered by this Court since *Jurek* to address a claim concerning the treatment of mitigating evidence under the Texas special issues. Like *Jurek* itself, *Franklin* did not produce a majority opinion for the Court. The *Franklin* plurality, and the two concurring Justices, concluded that Franklin was not sentenced to death in violation of the Eighth Amendment because the jury was free to give effect to his mitigating evidence of good behavior in prison by answering "no" to the question on future dangerousness. 487 U. S., at 177 (plurality opinion); *id.*, at 185 (O'CONNOR, J., concurring in judgment). Moreover, a majority agreed that "residual doub[t]" as to Franklin's guilt was not a constitutionally mandated mitigating factor. *Id.*, at 173, and n. 6 (plurality opinion); *id.*, at 187–188 (O'CONNOR, J., concurring in judgment).

In *Franklin*, however, the five concurring and dissenting Justices did not share the plurality's categorical reading of *Jurek*. In the plurality's view, *Jurek* had expressly and unconditionally upheld the manner in which mitigating evidence is considered under the special issues. *Id.*, at 179–180, and

n. 10. In contrast, five Members of the Court read *Jurek* as not precluding a claim that, in a particular case, the jury was unable to fully consider the mitigating evidence introduced by a defendant in answering the special issues. 487 U. S., at 183 (O'CONNOR, J., concurring in judgment); *id.*, at 199–200 (STEVENS, J., dissenting). Indeed, both the concurrence and the dissent understood *Jurek* as resting fundamentally on the express assurance that the special issues would permit the jury to fully consider all the mitigating evidence a defendant introduced that was relevant to the defendant's background and character and to the circumstances of the offense. Moreover, both the concurrence and the dissent stressed that "the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration" in imposing sentence. 487 U. S., at 185 (O'CONNOR, J., concurring in judgment); *id.*, at 199 (STEVENS, J., dissenting).

The concurrence in *Franklin* concluded that there was no Eighth Amendment violation in that case because Franklin's evidence of his good prison behavior had no clear relevance to his character other than to demonstrate his ability to live in a highly structured prison environment without endangering others. Thus, the jury was able to give effect to the mitigating force of this evidence in answering the second special issue. The concurrence noted, however:

> "If . . . petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence. If this were such a case, then we would have to decide whether the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation." *Id.*, at 185.

Penry argues that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its "reasoned moral response" to that evidence in determining whether death was the appropriate punishment. We agree. Thus, we reject the State's contrary argument that the jury was able to consider and give effect to all of Penry's mitigating evidence in answering the special issues without any jury instructions on mitigating evidence.

The first special issue asks whether the defendant acted "deliberately and with the reasonable expectation that the death of the deceased . . . would result." Neither the Texas Legislature nor the Texas Court of Criminal Appeals have defined the term "deliberately," and the jury was not instructed on the term, so we do not know precisely what meaning the jury gave to it. Assuming, however, that the jurors in this case understood "deliberately" to mean something more than that Penry was guilty of "intentionally" committing murder, those jurors may still have been unable to give effect to Penry's mitigating evidence in answering the first special issue.

Penry's mental retardation was relevant to the question whether he was capable of acting "deliberately," but it also "had relevance to [his] moral culpability beyond the scope of the special verdict questio[n]." *Franklin, supra,* at 185. Personal culpability is not solely a function of a defendant's capacity to act "deliberately." A rational juror at the penalty phase of the trial could have concluded, in light of Penry's confession, that he deliberately killed Pamela Carpenter to escape detection. Because Penry was mentally retarded, however, and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, that same juror could also conclude that Penry was less morally "culpable than defendants who have no such excuse," but

who acted "deliberately" as that term is commonly understood. *California* v. *Brown*, 479 U. S., at 545 (O'CONNOR, J., concurring). See also *Skipper* v. *South Carolina*, 476 U. S. 1, 13–14 (1986) (Powell, J., concurring in judgment) (evidence concerning a defendant's "emotional history . . . bear[s] directly on the fundamental justice of imposing capital punishment").

In the absence of jury instructions defining "deliberately" in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue. Without such a special instruction, a juror who believed that Penry's retardation and background diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime "deliberately." Thus, we cannot be sure that the jury's answer to the first special issue reflected a "reasoned moral response" to Penry's mitigating evidence.

The second special issue asks "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The mitigating evidence concerning Penry's mental retardation indicated that one effect of his retardation is his inability to learn from his mistakes. Although this evidence is relevant to the second issue, it is relevant only as an *aggravating* factor because it suggests a "yes" answer to the question of future dangerousness. The prosecutor argued at the penalty hearing that there was "a very strong probability, based on the history of this defendant, his previous criminal record, and the psychiatric testimony that we've had in this case, that the defendant will continue to commit acts of this nature." App. 214. Even in a prison setting, the prosecutor

argued, Penry could hurt doctors, nurses, librarians, or teachers who worked in the prison.

Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future. As Judge Reavley wrote for the Court of Appeals below:

> "What was the jury to do if it decided that Penry, because of retardation, arrested emotional development and a troubled youth, should not be executed? If anything, the evidence made it more likely, not less likely, that the jury would answer the second question yes. It did not allow the jury to consider a major thrust of Penry's evidence as *mitigating* evidence." 832 F. 2d, at 925 (footnote omitted) (emphasis in original).

The second special issue, therefore, did not provide a vehicle for the jury to give mitigating effect to Penry's evidence of mental retardation and childhood abuse.

The third special issue asks "whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." On this issue, the State argued that Penry stabbed Pamela Carpenter with a pair of scissors not in response to provocation, but "for the purpose of avoiding detection." App. 215. Penry's own confession indicated that he did not stab the victim after she wounded him superficially with a scissors during a struggle, but rather killed her after her struggle had ended and she was lying helpless. Even if a juror concluded that Penry's mental retardation and arrested emotional development rendered him less culpable for his crime than a normal adult, that would not necessarily diminish the "unreasonableness" of his conduct in response to "the provocation, if any, by the deceased." Thus, a juror who believed Penry lacked the moral culpability to be sentenced to death could not express that view in answering the third special issue if she also con-

cluded that Penry's action was not a reasonable response to provocation.

The State contends, notwithstanding the three interrogatories, that Penry was free to introduce and argue the significance of his mitigating circumstances to the jury. In fact, defense counsel did argue that if a juror believed that Penry, because of the mitigating evidence of his mental retardation and abused background, did not deserve to be put to death, the juror should vote "no" on one of the special issues even if she believed the State had proved that the answer should be "yes." Thus, Penry's counsel stressed the evidence of Penry's mental retardation and abused background, and asked the jurors, "can you be proud to be a party to putting a man to death with that affliction?" App. 222. He urged the jury to answer the first special issue "no" because "it would be the just answer, and I think it would be a proper answer." *Id.*, at 223. As for the prediction of the prosecution psychiatrist that Penry was likely to continue to get into trouble, the defense argued: "That may be true. But, a boy with this mentality, with this mental affliction, even though you have found that issue against us as to insanity, I don't think that there is any question in a single one of you juror's *[sic]* minds that there is something definitely wrong, basically, with this boy. And I think there is not a single one of you that doesn't believe that this boy had brain damage. . . ." *Id.*, at 223–224. In effect, defense counsel urged the jury to "[t]hink about each of those special issues and see if you don't find that we're inquiring into the mental state of the defendant in each and every one of them." *Id.*, at 221.

In rebuttal, the prosecution countered by stressing that the jurors had taken an oath to follow the law, and that they must follow the instructions they were given in answering the special issues:

> "You've all taken an oath to follow the law and you know what the law is. . . . In answering these questions based on the evidence and following the law, and that's all that

> I asked you to do, is to go out and look at the evidence. The burden of proof is on the State as it has been from the beginning, and we accept that burden. And I honestly believe that we have more than met that burden, and that's the reason that you didn't hear Mr. Newman [defense attorney] argue. He didn't pick out these issues and point out to you where the State had failed to meet this burden. He didn't point out the weaknesses in the State's case because, ladies and gentlemen, I submit to you we've met our burden. . . . [Y]our job as jurors and your duty as jurors is not to act on your emotions, but to act on the law as the Judge has given it to you, and on the evidence that you have heard in this courtroom, then answer those questions accordingly." *Id.*, at 225–226.

In light of the prosecutor's argument, and in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence.

The State conceded at oral argument in this Court that if a juror concluded that Penry acted deliberately and was likely to be dangerous in the future, but also concluded that because of his mental retardation he was not sufficiently culpable to deserve the death penalty, that juror would be unable to give effect to that mitigating evidence under the instructions given in this case. Tr. of Oral Arg. 38. The State contends, however, that to instruct the jury that it could render a discretionary grant of mercy, or say "no" to the death penalty, based on Penry's mitigating evidence, would be to return to the sort of unbridled discretion that led to *Furman* v. *Georgia*, 408 U. S. 238 (1972). We disagree.

To be sure, *Furman* held that "in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing author-

ity would focus on the particularized circumstances of the crime and the defendant." *Gregg* v. *Georgia*, 428 U. S. 153, 199 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). But as we made clear in *Gregg*, so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant. *Id.*, at 197–199, 203. As JUSTICE WHITE wrote in *Gregg:*

> "The Georgia legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail. As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is particularly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device." *Id.*, at 222 (opinion concurring in judgment).

"In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence." *McCleskey* v. *Kemp*, 481 U. S. 279, 304 (1987) (emphasis in original). Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give

effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a "'reasoned *moral* response to the defendant's background, character, and crime.'" *Franklin*, 487 U. S., at 184 (O'CONNOR, J., concurring in judgment) (quoting *California* v. *Brown*, 479 U. S., at 545 (O'CONNOR, J., concurring)). In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," *Woodson*, 428 U. S., at 305, the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.

In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision. Our reasoning in *Lockett* and *Eddings* thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U. S., at 605; *Eddings*, 455 U. S., at 119 (O'CONNOR, J., concurring). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett*, *supra*, at 605.

IV

Penry's second claim is that it would be cruel and unusual punishment, prohibited by the Eighth Amendment, to execute a mentally retarded person like himself with the reasoning capacity of a 7-year-old. He argues that because of their mental disabilities, mentally retarded people do not possess the level of moral culpability to justify imposing the death

sentence. He also argues that there is an emerging national consensus against executing the mentally retarded. The State responds that there is insufficient evidence of a national consensus against executing the retarded, and that existing procedural safeguards adequately protect the interests of mentally retarded persons such as Penry.

A

Under *Teague*, we address the retroactivity issue as a threshold matter because Penry is before us on collateral review. 489 U. S., at 310. If we were to hold that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry, we would be announcing a "new rule." *Id.*, at 301. Such a rule is not dictated by precedent existing at the time Penry's conviction became final. Moreover, such a rule would "brea[k] new ground" and would impose a new obligation on the States and the Federal Government. *Ibid.* (citing *Ford* v. *Wainwright*, 477 U. S. 399, 410 (1986), which held that the Eighth Amendment prohibits the execution of insane persons, as a case announcing a new rule).

In *Teague*, we concluded that a new rule will not be applied retroactively to defendants on collateral review unless it falls within one of two exceptions. Under the first exception articulated by Justice Harlan, a new rule will be retroactive if it places "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague*, *supra*, at 307 (quoting *Mackey*, 401 U. S., at 692 (Harlan, J., concurring in judgments in part and dissenting in part)). Although *Teague* read this exception as focusing solely on new rules according constitutional protection to an actor's primary conduct, Justice Harlan did speak in terms of substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed. This Court subsequently held that the Eighth Amendment, as a substantive matter, prohibits imposing the death penalty on a certain class of defendants because of their

status, *Ford* v. *Wainwright*, *supra*, at 410 (insanity), or because of the nature of their offense, *Coker* v. *Georgia*, 433 U. S. 584 (1977) (rape) (plurality opinion). In our view, a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity have little force. As Justice Harlan wrote: "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey*, *supra*, at 693. Therefore, the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. Thus, if we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review. Accordingly, we address the merits of Penry's claim.

B

The Eighth Amendment categorically prohibits the infliction of cruel and unusual punishments. At a minimum, the Eighth Amendment prohibits punishment considered cruel and unusual at the time the Bill of Rights was adopted. *Ford* v. *Wainwright*, *supra*, at 405; *Solem* v. *Helm*, 463 U. S. 277, 285–286 (1983). The prohibitions of the Eighth Amendment are not limited, however, to those practices condemned by the common law in 1789. *Ford*, *supra*, at 406; *Gregg* v. *Georgia*, 428 U. S., at 171. The prohibition against cruel and unusual punishments also recognizes the "evolving stand-

ards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion); *Ford*, *supra*, at 406. In discerning those "evolving standards," we have looked to objective evidence of how our society views a particular punishment today. See *Coker* v. *Georgia*, *supra*, at 593–597; *Enmund* v. *Florida*, 458 U. S. 782, 788–796 (1982). The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures. We have also looked to data concerning the actions of sentencing juries. *Enmund*, *supra*, at 794–796; *Thompson* v. *Oklahoma*, 487 U. S. 815, 831 (1988) (plurality opinion).

It was well settled at common law that "idiots," together with "lunatics," were not subject to punishment for criminal acts committed under those incapacities. As Blackstone wrote:

> "The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz. in an *idiot* or a *lunatic*. . . . [I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. . . . [A] total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses. . . . " 4 W. Blackstone, Commentaries *24—*25 (emphasis in original).

See also 1 W. Hawkins, Pleas of the Crown 1–2 (7th ed. 1795) ("[T]hose who are under a natural disability of distinguishing between good and evil, as . . . ideots, and lunaticks are not punishable by any criminal prosecution whatsoever"). Idiocy was understood as "a defect of understanding from the moment of birth," in contrast to lunacy, which was "a partial derangement of the intellectual faculties, the senses returning at uncertain intervals." *Id.*, at 2, n. 2.

There was no one definition of idiocy at common law, but the term "idiot" was generally used to describe persons who

had a total lack of reason or understanding, or an inability to distinguish between good and evil. Hale wrote that a person who is deaf and mute from birth "is in presumption of law an ideot . . . because he hath no possibility to understand what is forbidden by law to be done, or under what penalties: but if it can appear, that he hath the use of understanding, . . . then he may be tried, and suffer judgment and execution." 1 M. Hale, Pleas of the Crown 34 (1736) (footnote omitted). See also *id.*, at 29 (citing A. Fitzherbert, 2 Natura Brevium 233 (7th ed. 1730)); *Trial of Edward Arnold*, 16 How. St. Tr. 695, 765 (Eng. 1724) ("[A] man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment"); S. Glueck, Mental Disorder and the Criminal Law 128–144 (1925).

The common law prohibition against punishing "idiots" and "lunatics" for criminal acts was the precursor of the insanity defense, which today generally includes "mental defect" as well as "mental disease" as part of the legal definition of insanity. See, *e. g.*, American Law Institute, Model Penal Code § 4.01, p. 61 (1985) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law"); 18 U. S. C. § 17 (1982 ed., Supp. V) (it is an affirmative defense to federal prosecution if "the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts" at the time the offense was committed). See generally Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 432–444 (1985).

In its emphasis on a permanent, congenital mental deficiency, the old common law notion of "idiocy" bears some similarity to the modern definition of mental retardation. Ellis & Luckasson, *supra*, at 417. The common law prohi-

bition against punishing "idiots" generally applied, however, to persons of such severe disability that they lacked the reasoning capacity to form criminal intent or to understand the difference between good and evil. In the 19th and early 20th centuries, the term "idiot" was used to describe the most retarded of persons, corresponding to what is called "profound" and "severe" retardation today. See AAMR, Classification in Mental Retardation 179 (H. Grossman ed. 1983); *id.*, at 9 ("idiots" generally had IQ of 25 or below).

The common law prohibition against punishing "idiots" for their crimes suggests that it may indeed be "cruel and unusual" punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions. Because of the protections afforded by the insanity defense today, such a person is not likely to be convicted or face the prospect of punishment. See ABA Standards for Criminal Justice 7–9.1, commentary, p. 460 (2d ed. 1980) (most retarded people who reach the point of sentencing are mildly retarded). Moreover, under *Ford* v. *Wainwright*, 477 U. S. 399 (1986), someone who is "unaware of the punishment they are about to suffer and why they are to suffer it" cannot be executed. *Id.*, at 422 (Powell, J., concurring in part and concurring in judgment).

Such a case is not before us today. Penry was found competent to stand trial. In other words, he was found to have the ability to consult with his lawyer with a reasonable degree of rational understanding, and was found to have a rational as well as factual understanding of the proceedings against him. *Dusky* v. *United States*, 362 U. S. 402 (1960); App. 20–24. In addition, the jury rejected his insanity defense, which reflected their conclusion that Penry knew that his conduct was wrong and was capable of conforming his conduct to the requirements of the law. Tex. Penal Code Ann. § 8.01(a) (1974 and Supp. 1989).

Penry argues, however, that there is objective evidence today of an emerging national consensus against execution of

the mentally retarded, reflecting the "evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S., at 101. Brief for Petitioner 37–39. The federal Anti-Drug Abuse Act of 1988, Pub. L. 100–690, § 7001(l), 102 Stat. 4390, 21 U. S. C. § 848*(l)* (1988 ed.), prohibits execution of a person who is mentally retarded. Only one State, however, currently bans execution of retarded persons who have been found guilty of a capital offense. Ga. Code Ann. § 17–7–131(j) (Supp. 1988). Maryland has enacted a similar statute which will take effect on July 1, 1989. Md. Ann. Code, Art. 27, § 412(f)(1) (1989).

In contrast, in *Ford* v. *Wainwright*, which held that the Eighth Amendment prohibits execution of the insane, considerably more evidence of a national consensus was available. No State permitted the execution of the insane, and 26 States had statutes explicitly requiring suspension of the execution of a capital defendant who became insane. *Ford*, 477 U. S., at 408, n. 2. Other States had adopted the common law prohibition against executing the insane. *Ibid.* Moreover, in examining the objective evidence of contemporary standards of decency in *Thompson* v. *Oklahoma*, the plurality noted that 18 States expressly established a minimum age in their death penalty statutes, and all of them required that the defendant have attained at least the age of 16 at the time of the offense. 487 U. S., at 829, and n. 30. In our view, the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.

Penry does not offer any evidence of the general behavior of juries with respect to sentencing mentally retarded defendants, nor of decisions of prosecutors. He points instead to several public opinion surveys that indicate strong public opposition to execution of the retarded. For example, a poll taken in Texas found that 86% of those polled supported the death penalty, but 73% opposed its application to the men-

tally retarded. Reply Brief for Petitioner 6–7; Austin American Statesman, November 15, 1988, p. B3. A Florida poll found 71% of those surveyed were opposed to the execution of mentally retarded capital defendants, while only 12% were in favor. Brief for Petitioner 38; App. 279. A Georgia poll found 66% of those polled opposed to the death penalty for the retarded, 17% in favor, with 16% responding that it depends how retarded the person is. Brief for Petitioner 38; App. 283. In addition, the AAMR, the country's oldest and largest organization of professionals working with the mentally retarded, opposes the execution of persons who are mentally retarded. AAMR, Resolution on Mental Retardation and the Death Penalty, January 1988, App. to Brief for American Association on Mental Retardation et al. as *Amici Curiae* 1a–2a (hereafter *Amici* Brief for AAMR et al.). The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.

C

Relying largely on objective evidence such as the judgments of legislatures and juries, we have also considered whether application of the death penalty to particular categories of crimes or classes of offenders violates the Eighth Amendment because it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering" or because it is "grossly out of proportion to the severity of the crime." *Coker* v. *Georgia*, 433 U. S., at 592 (plurality opinion); *Thompson* v. *Oklahoma*, 487 U. S., at 833 (plurality opinion); *Tison* v. *Arizona*, 481 U. S. 137 (1987); *Enmund* v. *Florida*, 458 U. S., at 798–801. *Gregg* noted

that "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." *Gregg* v. *Georgia*, 428 U. S., at 183 (joint opinion of Stewart, Powell, and STEVENS, JJ.). "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison* v. *Arizona*, *supra*, at 149. See also *Enmund*, *supra*, at 825 (O'CONNOR, J., dissenting) (the Eighth Amendment concept of "proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness").

Penry argues that execution of a mentally retarded person like himself with a reasoning capacity of approximately a 7-year-old would be cruel and unusual because it is disproportionate to his degree of personal culpability. Brief for Petitioner 49–50. Just as the plurality in *Thompson* reasoned that a juvenile is less culpable than an adult for the same crime, 487 U. S., at 835, Penry argues that mentally retarded people do not have the judgment, perspective, and self-control of a person of normal intelligence. In essence, Penry argues that because of his diminished ability to control his impulses, to think in long-range terms, and to learn from his mistakes, he "is not capable of acting with the degree of culpability that can justify the ultimate penalty," *id.*, at 823.

The AAMR and other groups working with the mentally retarded agree with Penry. They argue as *amici* that all mentally retarded people, regardless of their degree of retardation, have substantial cognitive and behavioral disabilities that reduce their level of blameworthiness for a capital offense. *Amici* Brief for AAMR et al. 5–9, 13–15. *Amici* do not argue that people with mental retardation cannot be held responsible or punished for criminal acts they commit. Rather, they contend that because of "disability in the areas of cognitive impairment, moral reasoning, control of impulsivity, and the ability to understand basic relationships between cause and effect," mentally retarded people cannot act

with the level of moral culpability that would justify imposition of the death sentence. *Id.*, at 4. Thus, in their view, execution of mentally retarded people convicted of capital offenses serves no valid retributive purpose. *Id.*, at 19.

It is clear that mental retardation has long been regarded as a factor that may diminish an individual's culpability for a criminal act. See *supra*, at 331–333; ABA Standards for Criminal Justice 7–9.3, commentary, at 463; *State* v. *Hall*, 176 Neb. 295, 310, 125 N. W. 2d 918, 927 (1964). See generally Ellis & Luckasson, 53 Geo. Wash. L. Rev., at 414. In its most severe forms, mental retardation may result in complete exculpation from criminal responsibility. Moreover, virtually all of the States with death penalty statutes that list statutory mitigating factors include as a mitigating circumstance evidence that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."[2] A number of States explicitly mention "mental defect" in connection with such a mitigating circumstance.[3] Indeed, as the Court holds in Part III of this opinion, the sentencing body must be allowed to consider mental retardation

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[2] Ala. Code § 13A–5–51(6) (1982). See also Ariz. Rev. Stat. Ann. § 13–702(E)(2) (Supp. 1988); Colo. Rev. Stat. § 16–11–103(5)(b) (1986 and Supp. 1988); Conn. Gen. Stat. § 53a–46a(g)(2) (1989); Fla. Stat. § 921.141(6)(f) (1987); Miss. Code Ann. § 99–19–101(6)(f) (Supp. 1988); Mo. Rev. Stat. § 565.032(3)(6) (1986); Mont. Code Ann. § 46–18–304(4) (1987); N. H. Rev. Stat. Ann. § 630:5 (II)(b)(4) (1986); N. M. Stat. Ann. § 31–20A–6(C) (1987); N. C. Gen. Stat. § 15A–2000(f)(6) (1988); 42 Pa. Cons. Stat. § 9711(e)(3) (1982); S. C. Code § 16–3–20(C)(b)(6) (1985); Va. Code § 19.2–264.4(B)(iv) (1983); Wyo. Stat. § 6–2–102(j)(vi) (1988).

[3] Ark. Code Ann. § 5–4–605(3) (1987); Cal. Penal Code Ann. § 190.3(h) (West 1988); Ky. Rev. Stat. Ann. § 532.025(2)(b)7 (Baldwin 1984); La. Code Crim. Proc. Ann., Art. 905.5(e) (West 1984); Neb. Rev. Stat. § 29–2523 (2)(g) (1985); N. J. Stat. Ann. § 2C: 11–3(c)(5)(d) (West Supp. 1988); Ohio Rev. Code Ann. § 2929.04(B)(3) (1987); Tenn. Code Ann. § 39–2–203(j)(8) (1982); Wash. Rev. Code § 10.95.070(6) (1987). Other formulations are used in Ind. Code § 35–50–2–9(c)(6) (1988); Md. Ann. Code, Art. 27, § 413 (g)(4) (1988); and Utah Code Ann. § 76–3–207(2)(d) (Supp. 1988).

as a mitigating circumstance in making the individualized determination whether death is the appropriate punishment in a particular case.

On the record before the Court today, however, I cannot conclude that all mentally retarded people of Penry's ability—by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty. Mentally retarded persons are individuals whose abilities and experiences can vary greatly. As the AAMR's standard work, Classification in Mental Retardation, points out:

> "The term *mental retardation*, as commonly used today, embraces a heterogeneous population, ranging from totally dependent to nearly independent people. Although all individuals so designated share the common attributes of low intelligence and inadequacies in adaptive behavior, there are marked variations in the degree of deficit manifested and the presence or absence of associated physical handicaps, stigmata, and psychologically disordered states." Classification in Mental Retardation, at 12.

In addition to the varying degrees of mental retardation, the consequences of a retarded person's mental impairment, including the deficits in his or her adaptive behavior, "may be ameliorated through education and habilitation." Ellis & Luckasson, *supra*, at 424, n. 54. Although retarded persons generally have difficulty learning from experience, *Amici* Brief for AAMR et al. 7, some are fully "capable of learning, working, and living in their communities." *Id.*, at 6. See American Association on Mental Deficiency, Monograph 6, Lives in Process: Mildly Retarded Adults in a Large City (R. Edgerton ed. 1984). In light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded

people, by definition, can never act with the level of culpability associated with the death penalty.

Penry urges us to rely on the concept of "mental age," and to hold that execution of any person with a mental age of seven or below would constitute cruel and unusual punishment. Tr. of Oral Arg. 22–25. Mental age is "calculated as the chronological age of nonretarded children whose average IQ test performance is equivalent to that of the individual with mental retardation." *Amici* Brief for AAMR et al. 14, n. 6. See D. Wechsler, The Measurement and Appraisal of Adult Intelligence 24–25 (4th ed. 1958). Such a rule should not be adopted today. First, there was no finding below by the judge or jury concerning Penry's "mental age." One of Penry's expert witnesses, Dr. Brown, testified that he estimated Penry's "mental age" to be 6½. App. 41. That same expert estimated that Penry's "social maturity" was that of a 9- or 10-year-old. *Ibid.* As a more general matter, the "mental age" concept, irrespective of its intuitive appeal, is problematic in several respects. As the AAMR acknowledges, "[t]he equivalence between nonretarded children and retarded adults is, of course, imprecise." *Amici* Brief for AAMR et al. 14, n. 6. The "mental age" concept may underestimate the life experiences of retarded adults, while it may overestimate the ability of retarded adults to use logic and foresight to solve problems. *Ibid.* The mental age concept has other limitations as well. Beyond the chronological age of 15 or 16, the mean scores on most intelligence tests cease to increase significantly with age. Wechsler 26. As a result, "[t]he average mental age of the average 20 year old is not 20 but 15 years." *Id.*, at 27. See also *In re Ramon M.*, 22 Cal. 3d 419, 429, 584 P. 2d 524, 531 (1978) ("[T]he 'mental age' of the average adult under present norms is approximately 16 years and 8 months").

Not surprisingly, courts have long been reluctant to rely on the concept of mental age as a basis for exculpating a defendant from criminal responsibility. See, *e. g.*, *In re*

Ramon M., *supra*, at 429, 584 P. 2d, at 531; *State* v. *Schilling*, 95 N. J. L. 145, 148, 112 A. 400, 402 (1920); *People* v. *Marquis*, 344 Ill. 261, 267, 176 N. E. 314, 316 (1931); *Criswell* v. *State*, 171 Ark. 255, 259, 283 S. W. 981, 983 (1926). Cf. *Pickett* v. *State*, 71 So. 2d 102, 107 (Ala. 1954). See generally Ellis & Luckasson, 53 Geo. Wash. L. Rev., at 435. Moreover, reliance on mental age to measure the capabilities of a retarded person for purposes of the Eighth Amendment could have a disempowering effect if applied in other areas of the law. Thus, on that premise, a mildly mentally retarded person could be denied the opportunity to enter into contracts or to marry by virtue of the fact that he had a "mental age" of a young child. In light of the inherent problems with the mental age concept, and in the absence of better evidence of a national consensus against execution of the retarded, mental age should not be adopted as a line-drawing principle in our Eighth Amendment jurisprudence.

In sum, mental retardation is a factor that may well lessen a defendant's culpability for a capital offense. But we cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by virtue of his or her mental retardation alone. So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether "death is the appropriate punishment" can be made in each particular case. While a national consensus against execution of the mentally retarded may someday emerge reflecting the "evolving standards of decency that mark the progress of a maturing society," there is insufficient evidence of such a consensus today.

Accordingly, the judgment below is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I agree that the jury instructions given at sentencing in this case deprived petitioner of his constitutional right to have a jury consider all mitigating evidence that he presented before sentencing him to die. I would also hold, however, that the Eighth Amendment prohibits the execution of offenders who are mentally retarded and who thus lack the full degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty.

I

I dissented in *Teague* v. *Lane*, 489 U. S. 288, 326 (1989), and I continue to believe that the plurality's unprecedented curtailment of the reach of the Great Writ in that case was without foundation. The *Teague* plurality adopted for no adequate reason a novel threshold test for federal review of state criminal convictions that, subject to narrow exceptions, precludes federal courts from considering a vast array of important federal questions on collateral review, and thereby both prevents the vindication of personal constitutional rights and deprives our society of a significant safeguard against future violations. In this case, the Court compounds its error by extending *Teague*'s notion that new rules will not generally be announced on collateral review to cases in which a habeas petitioner challenges the constitutionality of a capital sentencing procedure. This extension means that a person may be killed although he or she has a sound constitutional claim that would have barred his or her execution had this Court only announced the constitutional rule before his or her conviction and sentence became final. It is intolerable that the difference between life and death should turn on such a fortuity of timing, and beyond my comprehension that a majority of this Court will so blithely allow a State to take a human life though the method by which sentence was determined violates our Constitution.

I say the Court takes this step "blithely" advisedly. The Court extends *Teague* without the benefit of briefing or oral argument. *Teague*, indeed, was decided only after we had heard argument in this case. Rather than postponing decision on the important issue whether *Teague* should be extended to capital cases until it is presented in a case in which it may be briefed and argued, the Court rushes to decide *Teague*'s applicability in such circumstances here. It does so in two sentences, *ante*, at 313–314, saying merely that not to apply *Teague* would result in delay in killing the prisoner and in a lack of finality. There is not the least hint that the Court has even considered whether different rules might be called for in capital cases, let alone any sign of reasoning justifying the extension. Such peremptory treatment of the issue is facilitated, of course, by the Court's decision to reach the *Teague* question without allowing counsel to set out the opposing arguments.

Though I believe *Teague* was wrongly decided, and the Court's precipitate decision to extend *Teague* to capital cases an error, nevertheless if these mistakes are to be made law I agree that the Court's discussion of the question whether the jury had an opportunity to consider Penry's mitigating evidence in answering Texas' three "special issues" does not establish a "new rule." I thus join Part II-B of the Court's opinion, and all of Parts I and III. I also agree that there is an exception to *Teague* so that new rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense" may be announced in, and applied to, cases on collateral review. *Ante*, at 330. I thus join Part IV-A of the Court's opinion.

II

A majority of the Court today reaffirms, in this case and in *Stanford* v. *Kentucky*, *post*, at 382 (O'CONNOR, J., concurring in part and concurring in judgment); *post*, at 393 (BRENNAN, J., dissenting), the well-established principle that

"application of the death penalty to particular categories of crimes or classes of offenders violates the Eighth Amendment [if] it 'makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering' or [if] it is 'grossly out of proportion to the severity of the crime.'" *Ante*, at 335 (opinion of O'CONNOR, J.), quoting *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977). The contours of these two inquiries are clear. We gauge whether a punishment is disproportionate by comparing "the gravity of the offense," understood to include not only the injury caused, but also the defendant's moral culpability, with "the harshness of the penalty." *Solem* v. *Helm*, 463 U. S. 277, 292 (1983). See *ante*, at 336; *Stanford*, *post*, at 382 (O'CONNOR, J., concurring in part and concurring in judgment); *post*, at 393–394 (BRENNAN, J., dissenting); *Thompson* v. *Oklahoma*, 487 U. S. 815, 834 (1988) (plurality opinion); *id.*, at 853 (opinion of O'CONNOR, J.); *Coker*, *supra*, at 598; *Enmund* v. *Florida*, 458 U. S. 782, 798 (1982) (opinion of the Court); *id.*, at 815 (O'CONNOR, J., dissenting). And we require that a punishment further the penal goals of deterrence or retribution. *Ante*, at 335–336; *Stanford*, *post*, at 403 (BRENNAN, J., dissenting); *Thompson*, *supra*, at 836 (plurality opinion); *Enmund*, *supra*, at 798; *Coker*, *supra*, at 592; *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). In my view, execution of the mentally retarded is unconstitutional under both these strands of Eighth Amendment analysis.

A

I agree with JUSTICE O'CONNOR that one question to be asked in determining whether the execution of mentally retarded offenders is always unconstitutional because disproportionate is whether the mentally retarded as a class "by virtue of their mental retardation alone, . . . inevitably lack the cognitive, volitional, and moral capacity to act with the

degree of culpability associated with the death penalty." *Ante*, at 338. JUSTICE O'CONNOR answers that question in the negative, "[i]n light of the diverse capacities and life experiences of mentally retarded persons." *Ibid.* It seems to me that the evidence compels a different conclusion.

For many purposes, legal and otherwise, to treat the mentally retarded as a homogeneous group is inappropriate, bringing the risk of false stereotyping and unwarranted discrimination. See Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 427 (1985). Nevertheless, there are characteristics as to which there is no danger of spurious generalization because they are a part of the clinical definition of mental retardation. "Mental retardation" is defined by the American Association on Mental Retardation (AAMR) as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." AAMR, Classification in Mental Retardation 11 (H. Grossman ed. 1983) (hereafter AAMR Classification). To fall within this definition, an individual must be among the approximately two percent of the population with an IQ below 70 on standardized measures of intelligence, see *id.*, at 31, and *in addition* must be subject to "significant limitations in [his or her] effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group," *id.*, at 11; see also *id.*, at 76 (noting "the imperfect correlation of intelligence and adaptive behavior, especially at the upper ends of the intellectual range of retardation"). Thus, while as between the mildly, moderately, severely, and profoundly mentally retarded, with IQs ranging from 70 to below 20, there are indeed "marked variations in the degree of deficit manifested," it is also true that "*all* individuals [designated as mentally retarded] share the common attributes of

low intelligence and inadequacies in adaptive behavior." *Id.*, at 12 (emphasis added).[1]

In light of this clinical definition of mental retardation, I cannot agree that the undeniable fact that mentally retarded persons have "diverse capacities and life experiences," *ante*, at 338, is of significance to the Eighth Amendment proportionality analysis we must conduct in this case. "Every individual who has mental retardation"—irrespective of his or her precise capacities or experiences—has "a substantial disability in cognitive ability and adaptive behavior." Brief for the AAMR et al. as *Amici Curiae* 5 (hereafter AAMR Brief). This is true even of the "highest functioning individuals in the 'mild' retardation category," *id.*, at 14, and of course of those like Penry whose cognitive and behavioral disabilities place them on the borderline between mild and moderate retardation. See *ante*, at 307–308, and n. 1. Among the mentally retarded, "reduced ability is found in every dimension of the individual's functioning, including his language, communication, memory, attention, ability to control impulsivity, moral development, self-concept, self-perception, suggestibility, knowledge of basic information, and general motivation." AAMR Brief 6. Though individuals, particularly those who are mildly retarded, may be quite capable of overcoming these limitations to the extent of being able to "main-

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[1] It is of course possible to classify those with developmental disabilities in different ways. Indeed, the question on which certiorari was granted in this case—whether it violates the Eighth Amendment "to execute an individual with the reasoning capacity of a seven year old"—concerned classification according to mental age. Petitioner conflates mental age and the AAMR's mental retardation classifications in his brief, and the Court addresses both proposals for Eighth Amendment line drawing. JUSTICE O'CONNOR's opinion does not, however, preclude the possibility that an Eighth Amendment line might be drawn using a classification that encompasses only a more substantially disabled group than all those within the AAMR's clinical definition of the mentally retarded, and that lacks the problems JUSTICE O'CONNOR associates with the concept of mental age, *ante*, at 338–340.

tain themselves independently or semi-independently in the community," AAMR Classification 184; see *id.*, at 207–208, nevertheless, the mentally retarded by definition "have a reduced ability to cope with and function in the everyday world." *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 442 (1985). The impairment of a mentally retarded offender's reasoning abilities, control over impulsive behavior, and moral development in my view limits his or her culpability so that, whatever other punishment might be appropriate, the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness and hence is unconstitutional.[2]

Even if mental retardation alone were not invariably associated with a lack of the degree of culpability upon which death as a proportionate punishment is predicated, I would still hold the execution of the mentally retarded to be unconstitutional. If there are among the mentally retarded exceptional individuals as responsible for their actions as persons who suffer no such disability, the individualized consideration afforded at sentencing fails to ensure that they are the only mentally retarded offenders who will be picked out to receive a death sentence. The consideration of mental retardation as a mitigating factor is inadequate to guarantee, as the Con-

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[2] Because a person's "mental age" is a factor only of his or her IQ and of the average IQs of nonretarded children, see *ante*, at 339, it is a less sophisticated and reliable guide to an individual's abilities than the accepted standards for diagnosing mental retardation, and must be supplemented with estimates of a person's "social maturity" measured in comparison to that of nonretarded children. In the present case, for example, there was testimony that petitioner had a mental age of 6½ and a social maturity equivalent to that of a 9- or 10-year-old. This evidence surely gives some insight into just what it is that Texas has proposed to do in killing Penry. However, "[t]he equivalence between nonretarded children and retarded adults is . . . imprecise," AAMR Brief 14, n. 6, and it seems on the basis of the information before us to be more appropriate to conduct proportionality analysis by reference to the accepted clinical classification of mental retardation than on the basis of age comparisons.

stitution requires, that an individual who is not fully blameworthy for his or her crime because of a mental disability does not receive the death penalty.

That "sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence" provides no assurance that an adequate individualized determination of whether the death penalty is a proportionate punishment will be made at the conclusion of each capital trial. *Ante*, at 340. At sentencing, the judge or jury considers an offender's level of blameworthiness only along with a host of other factors that the sentencer may decide outweigh any want of responsibility. The sentencer is free to weigh a mentally retarded offender's relative lack of culpability against the heinousness of the crime and other aggravating factors and to decide that even the most retarded and irresponsible of offenders should die. Indeed, a sentencer will entirely discount an offender's retardation as a factor mitigating against imposition of a death sentence if it adopts this line of reasoning:

> "It appears to us that there is all the more reason to execute a killer if he is also . . . retarded. Killers often kill again; [a] retarded killer is more to be feared than a . . . normal killer. There is also far less possibility of his ever becoming a useful citizen." Upholding Law and Order, Hartsville Messenger, June 24, 1987, p. 5B, col. 1 (approving death sentence imposed on mentally retarded murderer by a South Carolina court).

Lack of culpability as a result of mental retardation is simply not isolated at the sentencing stage as a factor that determinatively bars a death sentence; for individualized consideration at sentencing is not designed to ensure that mentally retarded offenders are not sentenced to death if they are not culpable to the degree necessary to render execution a proportionate response to their crimes. When Johnny Penry is resentenced, absent a change in Texas law there will be nothing to prevent the jury, acting lawfully, from

sentencing him to death once again—even though it finds his culpability significantly reduced by reason of mental retardation. I fail to see how that result is constitutional, in the face of the acknowledged Eighth Amendment requirement of proportionality.

B

There is a second ground upon which I would conclude that the execution of mentally retarded offenders violates the Eighth Amendment: killing mentally retarded offenders does not measurably further the penal goals of either retribution or deterrence. "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison* v. *Arizona*, 481 U. S. 137, 149 (1987); see also *Enmund*, 458 U. S., at 800. Since mentally retarded offenders as a class lack the culpability that is a prerequisite to the proportionate imposition of the death penalty, it follows that execution can never be the "just deserts" of a retarded offender, *id.*, at 801, and that the punishment does not serve the retributive goal, see *Stanford*, *post*, at 404 (BRENNAN, J., dissenting) ("A punishment that fails the Eighth Amendment test of proportionality because disproportionate to the offender's blameworthiness by definition is not justly deserved").

Furthermore, killing mentally retarded offenders does not measurably contribute to the goal of deterrence. It is highly unlikely that the exclusion of the mentally retarded from the class of those eligible to be sentenced to death will lessen any deterrent effect the death penalty may have for nonretarded potential offenders, for they, of course, will under present law remain at risk of execution. And the very factors that make it disproportionate and unjust to execute the mentally retarded also make the death penalty of the most minimal deterrent effect so far as retarded potential offenders are concerned. "[I]ntellectual impairments . . . in logical reasoning, strategic thinking, and foresight," the lack of the intellectual and developmental predicates of an "ability to

anticipate consequences," and "impairment in the ability to control impulsivity," AAMR Brief 6–7, mean that the possibility of receiving the death penalty will not in the case of a mentally retarded person figure in some careful assessment of different courses of action. See also *id.*, at 7 ("[A] person who has mental retardation often cannot independently generate in his mind a sufficient range of behaviors from which to select an action appropriate to the situation he faces (particularly a stressful situation)"). In these circumstances, the execution of mentally retarded individuals is "nothing more than the purposeless and needless imposition of pain and suffering," *Coker*, 433 U. S., at 592, and is unconstitutional under the Eighth Amendment.

Because I believe that the Eighth Amendment to the United States Constitution stands in the way of a State killing a mentally retarded person for a crime for which, as a result of his or her disability, he or she is not fully culpable, I would reverse the judgment of the Court of Appeals in its entirety.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring in part and dissenting in part.

As I stated in my separate opinion in *Teague* v. *Lane*, 489 U. S. 288, 318–319, and n. 2 (1989), it is neither logical nor prudent to consider a rule's retroactive application before the rule itself is articulated. Nor am I at all sure that courts should decide the retroactivity issue if it was not raised below. Cf. *Zant* v. *Moore*, 489 U. S. 836, 837 (1989) (BLACKMUN, J., dissenting). Finally, I do not support the Court's assertion, without benefit of argument or briefing on the issue, that *Teague*'s retroactivity principles pertain to capital cases. Cf. *Teague*, 489 U. S., at 321, and n. 3 (STEVENS, J., concurring in part and concurring in judgment). But assuming, *arguendo*, that those principles do apply, it is clear that the Court's discussion of the mitigating evidence question, with which I agree, does not establish a "new rule"

as that term is used for retroactivity purposes. I thus join Parts I, II–B, and III.

In Part IV–A the Court decides that a rule that the Eighth Amendment prohibits the execution of a mentally retarded person ought to apply retroactively. Assuming retroactivity is pertinent, I agree that the first exception to Justice Harlan's nonretroactivity doctrine "should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense," *ante*, at 330, and that this claim lies within that exception.*

The remaining sections of Part IV adequately and fairly state the competing arguments respecting capital punishment of mentally retarded persons. In my judgment, however, that explication—particularly the summary of the arguments advanced in the Brief for American Association on Mental Retardation et al. as *Amici Curiae*, *ante*, at 336–337—compels the conclusion that such executions are unconstitutional. I would therefore reverse the judgment of the Court of Appeals in its entirety.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY join, concurring in part and dissenting in part.

I

I join Part I of the Court's opinion, setting forth the facts and procedural history of this case; Part II–A, holding that *Teague* v. *Lane*, 489 U. S. 288 (1989), which precludes collat-

*Because I believe that retroactivity should not be considered until after a right is established, see *Teague* v. *Lane*, 489 U. S. 288, 318–319, and n. 2 (1989) (STEVENS, J., concurring in part and concurring in judgment), the Court's rejection of this claim ordinarily would preclude me from agreeing even for purposes of argument that the rule Penry seeks may be applied retroactively. I do so here because the Court has fleshed out the merits of Penry's claim sufficiently to allow me to reach a contrary conclusion.

eral relief that would establish a "new rule," applies to capital sentencing; and Part IV–A, holding that the exception to *Teague* for a new rule that places certain matters "'beyond the power of the criminal law-making authority,'" *id.*, at 311, quoting *Mackey* v. *United States*, 401 U. S. 667, 692 (1971) (separate opinion of Harlan, J.), applies to petitioner's contention that the Eighth Amendment forbids the execution of mentally retarded offenders. I also join Part IV–B, rejecting the latter contention on the ground that execution of mentally retarded offenders contravenes neither those practices condemned at the time the Bill of Rights was adopted nor the "evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion). Unlike JUSTICE O'CONNOR, however, I think we need go no further to resolve the Eighth Amendment issue. Part IV–C of her opinion goes on to examine whether application of the death penalty to mentally retarded offenders "violates the Eighth Amendment because it 'makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering' or because it is 'grossly out of proportion to the severity of the crime.'" *Ante*, at 335 (citations omitted). For the reasons explained by the plurality in *Stanford* v. *Kentucky*, *post*, p. 361, I think this inquiry has no place in our Eighth Amendment jurisprudence. "The punishment is either 'cruel *and* unusual' (*i. e.*, society has set its face against it) or it is not." *Post*, at 378 (emphasis in original). If it is not unusual, that is, if an objective examination of laws and jury determinations fails to demonstrate society's disapproval of it, the punishment is not unconstitutional even if out of accord with the theories of penology favored by the Justices of this Court. See *post*, at 379.

II

I disagree with the holding in Part II–B of the Court's opinion that petitioner's contention, that his sentencing was

unconstitutional because the Texas jury was not permitted fully to consider and give effect to the mitigating evidence of his mental retardation and background of abuse, does not seek the application of a "new rule" and is therefore not barred by *Teague*. I also disagree with the disposition of the merits of this contention, in Part III of the Court's opinion.

A

The merits of this mitigation issue, and the question whether, in raising it on habeas, petitioner seeks application of a "new rule" within the meaning of *Teague*, are obviously interrelated. I will say only a few words addressed exclusively to the latter. Our holding in *Teague* rested upon the historic role of habeas corpus in our system of law, which is to provide a "deterrence," "'the threat of [which] serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.'" 489 U. S., at 306, quoting *Desist* v. *United States*, 394 U. S. 244, 262–263 (1969) (Harlan, J., dissenting). "Deterrence" and "threat" are meaningless concepts as applied to a situation in which the law is so uncertain that a judge acting in all good faith and with the greatest of care could reasonably read our precedents as permitting the result the habeas petitioner contends is wrong. Thus, a "new rule," for purposes of *Teague*, must include not only a new rule that replaces an old one, but a new rule that replaces palpable uncertainty as to what the rule might be. We acknowledged as much in *Teague* (in a passage given lip-service by the Court today, see *ante*, at 314) when we said that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 489 U. S., at 301.

As my discussion of the merits will make plain, it challenges the imagination to think that today's result is "dictated" by our prior cases. Indeed, if there is any available

contention that our prior cases *compelled* a particular result, it is the contention that petitioner's claim was considered and rejected by *Jurek* v. *Texas*, 428 U. S. 262 (1976). Even if that contention is rejected, however, there is *no* basis for finding a compulsion in the opposite direction. It seems to me utterly impossible to say that a judge acting in good faith and with care should have known the rule announced today, and that future fault similar to that of which the Texas courts have been guilty must be deterred by making good on the "threat" of habeas corpus.

In a system based on precedent and *stare decisis*, it is the tradition to find each decision "inherent" in earlier cases (however well concealed its presence might have been), and rarely to replace a previously announced rule with a new one. If *Teague* does not apply to a claimed "inherency" as vague and debatable as that in the present case, then it applies only to habeas requests for plain overruling—which means that it adds little if anything to the principles already in place concerning the retroactivity of new rules in criminal cases, which provide that "a decision announcing a new standard 'is almost automatically nonretroactive' where the decision 'has explicitly overruled past precedent.'" *Allen* v. *Hardy*, 478 U. S. 255, 258 (1986), quoting *Solem* v. *Stumes*, 465 U. S. 638, 646, 647 (1984). It is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same Term.

B

I turn next to the merits of petitioner's mitigation claim. In *Furman* v. *Georgia*, 408 U. S. 238 (1972), we invalidated Georgia's capital punishment scheme on the ground that, since there were no standards as to when it would be applied for a particular crime, it created too great a risk that the death penalty would be irrationally imposed. Four years later, however, we struck down the capital sentencing schemes of North Carolina and Louisiana for the opposite vice—because they unduly *constricted* sentencing discretion

by failing to allow for individualized consideration of the particular defendant and offense, see *Woodson* v. *North Carolina*, 428 U. S. 280 (1976); *Roberts* v. *Louisiana*, 428 U. S. 325 (1976). On the same day, however, we upheld the schemes of Georgia, Texas, and Florida, because they struck the proper balance, channeling the sentencer's discretion without unduly restricting it. *Gregg* v. *Georgia*, 428 U. S. 153 (1976); *Jurek* v. *Texas*, *supra*; *Proffitt* v. *Florida*, 428 U. S. 242, 253 (1976). The Texas system upheld in *Jurek* was precisely the same one the Court finds unacceptable today, which structures the jury's discretion through three questions relating to the defendant's personal culpability for the crime, his future dangerousness, and the reasonableness of his response to any provocation by the victim. In holding that this scheme unconstitutionally limits the jury's discretion to consider the mitigating evidence of Penry's mental retardation and abused childhood, the Court today entirely disregards one of the two lines of our concern, requiring individualized consideration to displace the channeling of discretion, and throwing away *Jurek* in the process.

The Court contends that its conclusion is not inconsistent with *Jurek* because that case merely upheld a facial challenge to the Texas Special Issues framework. According to the Court, it did not "preclud[e] a claim that, in a particular case, the jury was unable to fully consider the mitigating evidence introduced by a defendant in answering the special issues." *Ante*, at 321. I disagree. While rejection of a facial challenge to a statute does not preclude all as-applied attacks, surely it precludes one resting upon the same asserted principle of law. And that is the situation here. The joint opinion announcing the judgment in *Jurek* (it is necessary only to describe the joint opinion, since the three Justices subscribing to the opinion of JUSTICE WHITE, 428 U. S., at 277, would have upheld the Texas statute on even broader grounds) said that "the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of

particularized mitigating factors." *Id.*, at 272. The claim that the Court entertains and vindicates today flatly contradicts that analysis, holding that the constitutionality turns on whether the questions allow mitigating factors not only to be considered (and, of course, given effect in answering the questions), *but also to be given effect in all possible ways, including ways that the questions do not permit.* It is simply not true that, as today's opinion asserts, the *Jurek* Court had before it "the express assurance that the special issues would permit the jury to fully consider all the mitigating evidence a defendant introduced." *Ante*, at 321. What the Court means by "fully consider" (what it *must* mean to distinguish *Jurek*) is to consider *for all purposes, including purposes not specifically permitted by the questions.* But there was no such assurance at all. To the contrary, the portion of the Texas Court of Criminal Appeals' opinion quoted in *Jurek* to evidence the assurance began: "'In determining the likelihood that the defendant would be a continuing threat to society [*i. e.*, in considering the second question under the Texas statute], the jury could consider . . . [,]'" 428 U. S., at 272–273, quoting 522 S. W. 2d 934, 939–940 (1975). The same focus upon the use of mitigating evidence for the limited purpose of answering the enumerated questions, rather than upon the jury's ability to use it for all purposes, is also evident in the joint opinion's statement that "[the] Texas Court of Criminal Appeals has not yet construed the first and third questions . . . ; thus it is as yet undetermined whether or not the jury's *consideration of those questions* would properly include consideration of mitigating circumstances." 428 U. S., at 272, n. 7 (emphasis added).

In short, it could not be clearer that *Jurek* adopted the constitutional rule that the instructions had to render all mitigating circumstances relevant to the jury's verdict, but that the precise manner of their relevance—the precise *effect* of their consideration—could be channeled by law. The joint opinion approved the Texas statute expressly because it "focuses the

jury's objective consideration of the particularized circumstances of the individual offense and the individual offender." *Id.*, at 274. Of course there remains available, in an as-applied challenge to the Texas statute, the contention that a particular mitigating circumstance is in fact irrelevant to any of the three questions it poses, and hence could not be considered. But that is not the case here, nor is it the ground upon which the Court relies. Special Issue One required the jury to determine whether "'the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result.'" *Ante*, at 310. As the plurality observed in *Franklin* v. *Lynaugh*, 487 U. S. 164 (1988), "[t]he Texas courts have consistently held that something more must be found in the penalty phase—something beyond the guilt-phase finding of 'intentional' commission of the crime—before the jury can determine that a capital murder is 'deliberate' within the meaning of the first Special Issue." *Id.*, at 171–175 (citing Texas cases). Evidence of Penry's mental retardation and abused childhood was relevant to that point. He was permitted to introduce all that evidence, relied upon it in urging the jury to answer "no" to the Special Issues, and had the benefit of an instruction specifically telling the jury to consider all evidence for that purpose. See App. 26. Thus, the only available contention here, and the basis on which the Court decides the case, is that this evidence "has relevance to . . . moral culpability beyond the scope of the special issues." *Ante*, at 322. That contention was considered and rejected by *Jurek*'s holding that the statute's "focus[ing of] the jury's objective consideration" was constitutional. 428 U. S., at 274.

But even if petitioner's claim is not foreclosed by *Jurek*, the Court clearly errs in asserting that our later precedents "compe[l]" the conclusion that it is valid, *ante*, at 328. While it is true that our cases have held that "a death penalty statute must not preclude consideration of relevant mitigating

factors," including "any aspect of a defendant's character or record and any of the circumstances of the offense," *Lockett* v. *Ohio*, 438 U. S. 586, 604, 608, (1978); see also *Eddings* v. *Oklahoma*, 455 U. S. 104, 110–112 (1982), we have never held that "the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors." *Franklin*, *supra*, at 179. As JUSTICE STEVENS pointed out in *Barclay* v. *Florida*, 463 U. S. 939 (1983), neither *Lockett* nor *Eddings* "establish[ed] the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence has no weight at all." 463 U. S., at 961, n. 2 (opinion concurring in judgment). See also *Zant* v. *Stephens*, 462 U. S. 862, 875–876, n. 13 (1983) ("[S]pecific standards for balancing aggravating against mitigating circumstances are not constitutionally required").

We have held that a State may not make the death penalty mandatory, see *Sumner* v. *Shuman*, 483 U. S. 66 (1987); *Woodson*, 428 U. S. 280 (1976); *Roberts*, 428 U. S. 325 (1976), and that it may not affirmatively preclude a sentencer from considering mitigating evidence presented by a defendant, see *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987); *Skipper* v. *South Carolina*, 476 U. S. 1 (1986). The sentences in *Eddings* and *Lockett*, the cases upon which the Court principally relies, ran afoul of the latter rule—*Eddings* because the sentencing judge thought Oklahoma law categorically prevented him from considering certain mitigating evidence, and *Lockett* because Ohio law limited the mitigating factors to three, which on their face would not embrace even such rudimentary elements as lack of intent to kill the victim, the defendant's comparatively minor role in the offense, and age. As we noted in *Jurek* and the Court does not contest today, Texas permits *all* mitigating factors to be considered, though only for purposes of answering the three Special Issues (and there is no question that the specific mitigation offered was relevant to at least one of them). That is why the *Lockett*

Court found the Texas statute "significantly different" from the Ohio scheme. 438 U. S., at 607. And that is why we have continued to say, after *Eddings* and *Lockett*, that the Texas Special Issues "allo[w] the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provid[e] for jury discretion." *Lowenfield* v. *Phelps*, 484 U. S. 231, 245 (1988). See also *Pulley* v. *Harris*, 465 U. S. 37, 48–49 (1984); *Zant* v. *Stephens*, *supra*, at 875–876, n. 13; *Adams* v. *Texas*, 448 U. S. 38, 46 (1980). I acknowledge that some statements in *Lockett* and *Eddings*, read in isolation from the facts of the cases, might be thought to establish the principle that the Court today adopts. One must read cases, however, not in a vacuum, but in light of their facts—which, in conjunction with the clear and constant reaffirmation of *Jurek*, leads to the conclusion that all mitigating factors must be able to be considered by the sentencer, but need not be able to be considered for all purposes.

Finally, I turn briefly to the place of today's holding within the broad scheme of our constitutional jurisprudence regarding capital sentencing, as opposed to the immediately applicable precedents. It is out of order there as well. As noted at the outset of this discussion, our law regarding capital sentencing has sought to strike a balance between complete discretion, which produces "wholly arbitary and capricious action," *Gregg*, 428 U. S., at 189, and no discretion at all, which prevents the individuating characteristics of the defendant and of the crime to be taken into account, *Woodson*, *supra*, at 303–304. That is why, in *Jurek*, we did not regard the Texas Special Issues as inherently bad, but to the contrary thought them a desirable means of "focus[ing] the jury's objective consideration of the particularized circumstances," 428 U. S., at 274, or, as the plurality put it in *Franklin*, "channel[ing] jury discretion . . . to achieve a more rational and equitable administration of the death penalty," 487 U. S., at 181. In providing for juries to consider all

mitigating circumstances insofar as they bear upon (1) deliberateness, (2) future dangerousness, and (3) provocation, it seems to me Texas had adopted a rational scheme that meets the two concerns of our Eighth Amendment jurisprudence. The Court today demands that it be replaced, however, with a scheme that simply dumps before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance whether he "lacked the moral culpability to be sentenced to death," *ante*, at 324, "did not deserve to be sentenced to death," *ante*, at 326, or "was not sufficiently culpable to deserve the death penalty," *ibid.* The Court seeks to dignify this by calling it a process that calls for a "reasoned moral response," *ante*, at 323, 328—but reason has nothing to do with it, the Court having eliminated the structure that required reason. It is an unguided, emotional "moral response" that the Court demands be allowed—an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy. Not only have we never before said the Constitution requires this, but the line of cases following *Gregg* sought to eliminate precisely the unpredictability it produces. See, *e. g.*, *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (States "must channel the [capital] sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death'") (citations omitted); *California* v. *Brown*, 479 U. S. 538, 541 (1987) ("[S]entencers may not be given unbridled discretion in determining the fates of those charged with capital offenses"; the "Constitution . . . requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion").

The Court cannot seriously believe that rationality and predictability can be achieved, and capriciousness avoided, by "'narrow[ing] a sentencer's discretion to *impose* the death

sentence,'" but expanding his discretion "'to *decline to impose* the death sentence,'" *ante*, at 327, quoting *McCleskey* v. *Kemp*, 481 U. S. 279, 304 (1987) (emphasis in original). The decision whether to impose the death penalty is a unitary one; unguided discretion not to impose is unguided discretion to impose as well. In holding that the jury had to be free to deem Penry's mental retardation and sad childhood relevant for whatever purpose it wished, the Court has come full circle, not only permitting but requiring what *Furman* once condemned. "Freakishly" and "wantonly," *Furman*, 408 U. S., at 310 (Stewart, J. concurring), have been rebaptized "reasoned moral response." I do not think the Constitution forbids what the Court imposes here, but I am certain it does not require it.

I respectfully dissent.

STANFORD *v.* KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 87–5765. Argued March 27, 1989—Decided June 26, 1989*

Petitioner in No. 87–5765 was approximately 17 years and 4 months old at the time he committed murder in Kentucky. A juvenile court, after conducting hearings, transferred him for trial as an adult under a state statute permitting such action as to offenders who are either charged with a Class A felony or capital crime or who are over the age of 16 and charged with a felony. Petitioner was convicted and sentenced to death. The State Supreme Court affirmed the death sentence, rejecting petitioner's contention that he had a constitutional right to treatment in the juvenile justice system, and declaring that his age and the possibility that he might be rehabilitated were mitigating factors properly left to the jury. Petitioner in No. 87–6026, who was approximately 16 years and 6 months old when he committed murder in Missouri, was certified for trial as an adult under a state statute permitting such action against individuals between 14 and 17 years old who have committed felonies. He pleaded guilty and was sentenced to death. The State Supreme Court affirmed, rejecting his contention that the sentence violated the Eighth Amendment.

Held: The judgments are affirmed.

No. 87–5765, 734 S. W. 2d 781, affirmed; No. 87–6026, 736 S. W. 2d 409, affirmed.

JUSTICE SCALIA delivered the opinion of the Court with respect to Parts I, II, III, and IV–A, concluding that the imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age does not constitute cruel and unusual punishment under the Eighth Amendment. Pp. 365–374.

(a) Whether a particular punishment violates the Eighth Amendment depends on whether it constitutes one of "those modes or acts of punishment . . . considered cruel and unusual at the time that the Bill of Rights was adopted," *Ford* v. *Wainwright*, 477 U. S. 399, 405, or is contrary to the "evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U. S. 86, 101. Petitioners have not alleged that their sentences would have been considered cruel and unusual in the 18th century, and could not support such a contention, since, at that

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*Together with No. 87–6026, *Wilkins* v. *Missouri*, on certiorari to the Supreme Court of Missouri.

time, the common law set the rebuttable presumption of incapacity to commit felonies (which were punishable by death) at the age of 14. In accordance with this common-law tradition, at least 281 offenders under 18, and 126 under 17, have been executed in this country. Pp. 368–370.

(b) In determining whether a punishment violates evolving standards of decency, this Court looks not to its own subjective conceptions, but, rather, to the conceptions of modern American society as reflected by objective evidence. *E. g.*, *Coker* v. *Georgia*, 433 U. S. 584, 592. The primary and most reliable evidence of national consensus—the pattern of federal and state laws—fails to meet petitioners' heavy burden of proving a settled consensus against the execution of 16- and 17-year-old offenders. Of the 37 States that permit capital punishment, 15 decline to impose it on 16-year-olds and 12 on 17-year-olds. This does not establish the degree of national agreement this Court has previously thought sufficient to label a punishment cruel and unusual. See *Tison* v. *Arizona*, 481 U. S. 137, 154. Pp. 370–373.

(c) Nor is there support for petitioners' argument that a demonstrable reluctance of juries to impose, and prosecutors to seek, capital sentences for 16- and 17-year-olds establishes a societal consensus that such sentences are inappropriate. Statistics showing that a far smaller number of offenders under 18 than over 18 have been sentenced to death reflect in part the fact that a far smaller percentage of capital crimes is committed by persons in the younger age group. Beyond that, it is likely that the very considerations that induce petitioners to believe death should *never* be imposed on such young offenders cause prosecutors and juries to believe it should *rarely* be imposed, so that the statistics are no proof of a categorical aversion. Pp. 373–374.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY, concluded in Parts IV–B and V that:

1. There is no relevance to the state laws cited by petitioners which set 18 or more as the legal age for engaging in various activities, ranging from driving to drinking alcoholic beverages to voting. Those laws operate in gross, and do not conduct individualized maturity tests for each driver, drinker, or voter; an age appropriate in the vast majority of cases must therefore be selected. In the realm of capital punishment, however, individualized consideration is a constitutional requirement. Twenty-nine States, including Kentucky and Missouri, have codified this requirement in laws specifically designating age as a mitigating factor that capital sentencers must be permitted to consider. Moreover, the determinations required by transfer statutes such as Kentucky's and Missouri's to certify a juvenile for trial as an adult ensure individualized consideration of the maturity and moral responsibility of 16- and 17-year-olds before they are even held to stand trial as adults. It is those particularized laws, rather than the generalized driving, drinking, and vot-

ing laws, that display society's views on the age at which no youthful offender should be held responsible. Pp. 374–377.

2. The indicia of national consensus offered by petitioners other than state and federal statutes and the behavior of prosecutors and juries cannot establish constitutional standards. Public opinion polls, the views of interest groups, and the positions of professional associations are too uncertain a foundation for constitutional law. Also insufficient is socioscientific or ethicoscientific evidence tending to show that capital punishment fails to deter 16- and 17-year-olds because they have a less highly developed fear of death, and fails to exact just retribution because juveniles, being less mature and responsible, are less morally blameworthy. The audience for such arguments is not this Court but the citizenry. Although several of the Court's cases have engaged in so-called "proportionality" analysis—which examines whether there is a disproportion between the punishment imposed and the defendant's blameworthiness, and whether a punishment makes any measurable contribution to acceptable goals of punishment—those decisions have never invalidated a punishment on that basis alone, but have done so only when there was also objective evidence of state laws or jury determinations establishing a societal consensus against the penalty. Pp. 377–380.

JUSTICE O'CONNOR, although agreeing that no national consensus presently forbids the imposition of capital punishment on 16- or 17-year-old murderers, concluded that this Court has a constitutional obligation to conduct proportionality analysis, see, *e. g.*, *Penry* v. *Lynaugh*, *ante*, at 335–340, and should consider age-based statutory classifications that are relevant to that analysis. Pp. 380–382.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and IV–A, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and KENNEDY, JJ., joined, and an opinion with respect to Parts IV–B and V, in which REHNQUIST, C. J., and WHITE and KENNEDY, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 380. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 382.

Frank W. Heft, Jr., argued the cause for petitioner in No. 87–5765. With him on the briefs were *J. David Niehaus* and *Daniel T. Goyette*. *Nancy A. McKerrow* argued the cause and filed briefs for petitioner in No. 87–6026.

Frederic J. Cowan, Attorney General of Kentucky, argued the cause for respondent in No. 87–5765. With him on the brief were *Elizabeth Ann Myerscough* and *David A. Smith*, Assistant Attorneys General. *John M. Morris III*, Assist-

ant Attorney General of Missouri, argued the cause for respondent in No. 87–6026. With him on the brief was *William L. Webster*, Attorney General.†

JUSTICE SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and IV–A, and an opinion with respect to Parts IV–B and V, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY join.

These two consolidated cases require us to decide whether the imposition of capital punishment on an individual for a

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†Briefs of *amici curiae* urging reversal in both cases were filed for the American Baptist Churches et al. by *Mark Evan Olive;* for the Child Welfare League of America et al. by *Randy Hertz* and *Martin Guggenheim;* and for the West Virginia Council of Churches by *Paul R. Stone.*

A brief of *amici curiae* urging affirmance in No. 87–6026 was filed for the State of Kentucky et al. by *Frederic J. Cowan*, Attorney General of Kentucky, *Elizabeth Ann Myerscough* and *David A. Smith*, Assistant Attorneys General, *Don Siegelman*, Attorney General of Alabama, *Robert K. Corbin*, Attorney General of Arizona, *John Steven Clark*, Attorney General of Arkansas, *John J. Kelly*, Chief State's Attorney of Connecticut, *Robert A. Butterworth*, Attorney General of Florida, *Linley E. Pearson*, Attorney General of Indiana, *Michael C. Moore*, Attorney General of Mississippi, *Michael T. Greely*, Attorney General of Montana, *Brian McKay*, Attorney General of Nevada, *Robert H. Henry*, Attorney General of Oklahoma, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *T. Travis Medlock*, Attorney General of South Carolina, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *Mary Sue Terry*, Attorney General of Virginia, and *Joseph B. Meyer*, Attorney General of Wyoming.

Briefs of *amici curiae* were filed in both cases for the American Bar Association by *Robert D. Raven* and *Andrew J. Shookhoff;* for the American Society for Adolescent Psychiatry et al. by *Joseph T. McLaughlin, Jeremy G. Epstein*, and *Henry Weisburg;* for Amnesty International by *Paul L. Hoffman, Joan W. Howarth, Mary E. McClymont, David Weissbrodt*, and *John E. Osborn;* for Defense for Children International-USA by *Anna Mamalakis Pappas;* for the International Human Rights Law Group by *Robert H. Kapp;* and for the National Legal Aid and Defender Association et al. by *Charles Ogletree* and *John H. Blume. Susan Apel* and *Michael Mello* filed a brief for the Office of the Capital Collateral Representative for the State of Florida as *amicus curiae* in No. 87–5765.

crime committed at 16 or 17 years of age constitutes cruel and unusual punishment under the Eighth Amendment.

I

The first case, No. 87–5765, involves the shooting death of 20-year-old Barbel Poore in Jefferson County, Kentucky. Petitioner Kevin Stanford committed the murder on January 7, 1981, when he was approximately 17 years and 4 months of age. Stanford and his accomplice repeatedly raped and sodomized Poore during and after their commission of a robbery at a gas station where she worked as an attendant. They then drove her to a secluded area near the station, where Stanford shot her pointblank in the face and then in the back of her head. The proceeds from the robbery were roughly 300 cartons of cigarettes, two gallons of fuel, and a small amount of cash. A corrections officer testified that petitioner explained the murder as follows: "'[H]e said, I had to shoot her, [she] lived next door to me and she would recognize me. . . . I guess we could have tied her up or something or beat [her up] . . . and tell her if she tells, we would kill her. . . . Then after he said that he started laughing.'" 734 S. W. 2d 781, 788 (Ky. 1987).

After Stanford's arrest, a Kentucky juvenile court conducted hearings to determine whether he should be transferred for trial as an adult under Ky. Rev. Stat. Ann. § 208.170 (Michie 1982). That statute provided that juvenile court jurisdiction could be waived and an offender tried as an adult if he was either charged with a Class A felony or capital crime, or was over 16 years of age and charged with a felony. Stressing the seriousness of petitioner's offenses and the unsuccessful attempts of the juvenile system to treat him for numerous instances of past delinquency, the juvenile court found certification for trial as an adult to be in the best interest of petitioner and the community.

Stanford was convicted of murder, first-degree sodomy, first-degree robbery, and receiving stolen property, and was sentenced to death and 45 years in prison. The Kentucky Supreme Court affirmed the death sentence, rejecting Stanford's "deman[d] that he has a constitutional right to treatment." 734 S. W. 2d, at 792. Finding that the record clearly demonstrated that "there was no program or treatment appropriate for the appellant in the juvenile justice system," the court held that the juvenile court did not err in certifying petitioner for trial as an adult. The court also stated that petitioner's "age and the possibility that he might be rehabilitated were mitigating factors appropriately left to the consideration of the jury that tried him." *Ibid.*

The second case before us today, No. 87–6026, involves the stabbing death of Nancy Allen, a 26-year-old mother of two who was working behind the sales counter of the convenience store she and David Allen owned and operated in Avondale, Missouri. Petitioner Heath Wilkins committed the murder on July 27, 1985, when he was approximately 16 years and 6 months of age. The record reflects that Wilkins' plan was to rob the store and murder "whoever was behind the counter" because "a dead person can't talk." While Wilkins' accomplice, Patrick Stevens, held Allen, Wilkins stabbed her, causing her to fall to the floor. When Stevens had trouble operating the cash register, Allen spoke up to assist him, leading Wilkins to stab her three more times in her chest. Two of these wounds penetrated the victim's heart. When Allen began to beg for her life, Wilkins stabbed her four more times in the neck, opening her carotid artery. After helping themselves to liquor, cigarettes, rolling papers, and approximately $450 in cash and checks, Wilkins and Stevens left Allen to die on the floor.

Because he was roughly six months short of the age of majority for purposes of criminal prosecution, Mo. Rev. Stat. § 211.021(1) (1986), Wilkins could not automatically be

tried as an adult under Missouri law. Before that could happen, the juvenile court was required to terminate juvenile court jurisdiction and certify Wilkins for trial as an adult under § 211.071, which permits individuals between 14 and 17 years of age who have committed felonies to be tried as adults. Relying on the "viciousness, force and violence" of the alleged crime, petitioner's maturity, and the failure of the juvenile justice system to rehabilitate him after previous delinquent acts, the juvenile court made the necessary certification.

Wilkins was charged with first-degree murder, armed criminal action, and carrying a concealed weapon. After the court found him competent, petitioner entered guilty pleas to all charges. A punishment hearing was held, at which both the State and petitioner himself urged imposition of the death sentence. Evidence at the hearing revealed that petitioner had been in and out of juvenile facilities since the age of eight for various acts of burglary, theft, and arson, had attempted to kill his mother by putting insecticide into Tylenol capsules, and had killed several animals in his neighborhood. Although psychiatric testimony indicated that Wilkins had "personality disorders," the witnesses agreed that Wilkins was aware of his actions and could distinguish right from wrong.

Determining that the death penalty was appropriate, the trial court entered the following order:

> "[T]he court finds beyond reasonable doubt that the following aggravating circumstances exist:
>
> "1. The murder in the first degree was committed while the defendant was engaged in the perpetration of the felony of robbery, and
>
> "2. The murder in the first degree involved depravity of mind and that as a result thereof, it was outrageously or wantonly vile, horrible or inhuman." App. in No. 87–6026, p. 77.

On mandatory review of Wilkins' death sentence, the Supreme Court of Missouri affirmed, rejecting the argument that the punishment violated the Eighth Amendment. 736 S. W. 2d 409 (1987).

We granted certiorari in these cases, 488 U. S. 887 (1988) and 487 U. S. 1233 (1988), to decide whether the Eighth Amendment precludes the death penalty for individuals who commit crimes at 16 or 17 years of age.

II

The thrust of both Wilkins' and Stanford's arguments is that imposition of the death penalty on those who were juveniles when they committed their crimes falls within the Eighth Amendment's prohibition against "cruel and unusual punishments." Wilkins would have us define juveniles as individuals 16 years of age and under; Stanford would draw the line at 17.

Neither petitioner asserts that his sentence constitutes one of "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford* v. *Wainwright*, 477 U. S. 399, 405 (1986). Nor could they support such a contention. At that time, the common law set the rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted capital punishment to be imposed on anyone over the age of 7. See 4 W. Blackstone, Commentaries *23–*24; 1 M. Hale, Pleas of the Crown 24–29 (1800). See also *In re Gault*, 387 U. S. 1, 16 (1967); Streib, Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen, 36 Okla. L. Rev. 613, 614–615 (1983); Kean, The History of the Criminal Liability of Children, 53 L. Q. Rev. 364, 369–370 (1937). In accordance with the standards of this common-law tradition, at least 281 offenders under the age of 18 have been executed in this country, and at least 126 under the age of 17. See V. Streib, Death Penalty for Juveniles 57 (1987).

Thus petitioners are left to argue that their punishment is contrary to the "evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion). They are correct in asserting that this Court has "not confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century," but instead has interpreted the Amendment "in a flexible and dynamic manner." *Gregg* v. *Georgia*, 428 U. S. 153, 171 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). In determining what standards have "evolved," however, we have looked not to our own conceptions of decency, but to those of modern American society as a whole.[1] As we have said, "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion). See also *Penry* v. *Lynaugh*, *ante*, at 331; *Ford* v. *Wainwright*, *supra*, at 406; *Enmund* v. *Florida*, 458 U. S. 782, 788–789 (1982); *Furman* v. *Georgia*, 408 U. S. 238, 277–279 (1972) (BRENNAN, J., concurring). This approach is dictated both by the language of the Amendment—which proscribes only those punishments that are both "cruel and *unusual*"—and by the "deference we owe to the decisions

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[1] We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* (accepted by the dissent, see *post*, at 389–390) that the sentencing practices of other countries are relevant. While "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," *Thompson* v. *Oklahoma*, 487 U. S. 815, 868–869, n. 4 (1988) (SCALIA, J., dissenting), quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937) (Cardozo, J.), they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.

of the state legislatures under our federal system," *Gregg* v. *Georgia*, *supra*, at 176.

III

"[F]irst" among the "'objective indicia that reflect the public attitude toward a given sanction'" are statutes passed by society's elected representatives. *McCleskey* v. *Kemp*, 481 U. S. 279, 300 (1987), quoting *Gregg* v. *Georgia*, *supra*, at 173. Of the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders.[2] This does

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[2] The following States preclude capital punishment of offenders under 18: California (Cal. Penal Code Ann. § 190.5 (West 1988)); Colorado (Colo. Rev. Stat. § 16–11–103(1)(a) (1986)); Connecticut (Conn. Gen. Stat. § 53a–46a(g)(1) (1989)); Illinois (Ill. Rev. Stat., ch. 38, ¶ 9–1(b) (1987)); Maryland (Md. Ann. Code, Art. 27, § 412(f) (Supp. 1988)); Nebraska (Neb. Rev. Stat. § 28–105.01 (1985)); New Hampshire (N. H. Rev. Stat. Ann. § 630:5 (XIII) (Supp. 1988)); New Jersey (N. J. Stat. Ann. § 2A:4A–22(a) (West 1987) and 2C:11–3(g) (West Supp. 1988)); New Mexico (N. M. Stat. Ann. §§ 28–6–1(A), 31–18–14(A) (1987)); Ohio (Ohio Rev. Code Ann. § 2929.02(A) (1987)); Oregon (Ore. Rev. Stat. §§ 161.620 and 419.476(1) (1987)); Tennessee (Tenn. Code Ann. §§ 37–1–102(3), 37–1–102(4), 37–1–103, 37–1–134(a)(1) (1984 and Supp. 1988)). Three more States preclude the death penalty for offenders under 17: Georgia (Ga. Code Ann. § 17–9–3 (1982)); North Carolina (N. C. Gen. Stat. § 14–17 (Supp. 1988)); Texas (Tex. Penal Code Ann. § 8.07(d) (Supp. 1989)).

The dissent takes issue with our failure to include, among those States evidencing a consensus against executing 16- and 17-year-old offenders, the District of Columbia and the 14 States that do not authorize capital punishment. *Post*, at 384–385. It seems to us, however, that while the number of those jurisdictions bears upon the question whether there is a consensus against capital punishment altogether, it is quite irrelevant to the specific inquiry in this case: whether there is a settled consensus in favor of punishing offenders under 18 differently from those over 18 insofar as capital punishment is concerned. The dissent's position is rather like discerning a national consensus that wagering on cockfights is inhumane by counting within that consensus those States that bar all wagering. The issue in the present case is not whether capital punishment is thought to be desirable but whether persons under 18 are thought to be specially exempt from it. With respect to that inquiry, it is no more logical to say that the capital-

not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual. In invalidating the death penalty for rape of an adult woman, we stressed that Georgia was the *sole* jurisdiction that authorized such a punishment. See *Coker* v. *Georgia*, *supra*, at 595–596. In striking down capital punishment for participation in a robbery in which an accomplice takes a life, we emphasized that only eight jurisdictions authorized similar punishment. *Enmund* v. *Florida*, *supra*, at 792. In finding that the Eighth Amendment precludes execution of the insane and thus requires an adequate hearing on the issue of sanity, we relied upon (in addition to the common-law rule) the fact that "no State in the Union" permitted such punishment. *Ford* v. *Wainwright*, 477 U. S., at 408. And in striking down a life sentence without parole under a recidivist statute, we stressed that "[i]t appears that [petitioner] was treated more severely than he would have been in any other State." *Solem* v. *Helm*, 463 U. S. 277, 300 (1983).

Since a majority of the States that permit capital punishment authorize it for crimes committed at age 16 or above,[3] petitioners' cases are more analogous to *Tison* v. *Arizona*, 481 U. S. 137 (1987), than *Coker*, *Enmund*, *Ford*, and *Solem*. In *Tison*, which upheld Arizona's imposition of the death penalty for major participation in a felony with reckless indifference to human life, we noted that only 11 of those ju-

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punishment laws of those States which prohibit capital punishment (and thus do not address age) support the dissent's position, than it would be to say that the age-of-adult-criminal-responsibility laws of those same States (which do not address capital punishment) support our position.

[3] The dissent again works its statistical magic by refusing to count among the States that authorize capital punishment of 16- and 17-year-old offenders those 19 States that set no minimum age in their death penalty statute, and specifically permit 16- and 17-year-olds to be sentenced as adults. *Post*, at 385. We think that describing this position is adequate response.

risdictions imposing capital punishment rejected its use in such circumstances. *Id.*, at 154. As we noted earlier, here the number is 15 for offenders under 17, and 12 for offenders under 18. We think the same conclusion as in *Tison* is required in these cases.

Petitioners make much of the recently enacted federal statute providing capital punishment for certain drug-related offenses, but limiting that punishment to offenders 18 and over. The Anti-Drug Abuse Act of 1988, Pub. L. 100–690, 102 Stat. 4390, § 7001(l), 21 U. S. C. § 848(*l*) (1988 ed.). That reliance is entirely misplaced. To begin with, the statute in question does not embody a judgment by the Federal Legislature that *no* murder is heinous enough to warrant the execution of such a youthful offender, but merely that the narrow class of offense it defines is not. The congressional judgment on the broader question, if apparent at all, is to be found in the law that permits 16- and 17-year-olds (after appropriate findings) to be tried and punished as adults for *all* federal offenses, including those bearing a capital penalty that is not limited to 18-year-olds.[4] See 18 U. S. C. § 5032 (1982 ed., Supp. V). Moreover, even if it were true that no

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[4] See 10 U. S. C. § 906a (1982 ed., Supp. V) (peacetime espionage); § 918 (murder by persons subject to Uniform Code of Military Justice); 18 U. S. C. §§ 32, 33, and 34 (1982 ed. and Supp. V) (destruction of aircraft, motor vehicles, or related facilities resulting in death); § 115(b)(3) (1982 ed., Supp. V) (retaliatory murder of member of immediate family of law enforcement officials) (by cross reference to § 1111 (1982 ed. and Supp. V)); § 351 (1982 ed. and Supp. V) (murder of Member of Congress, high-ranking executive official, or Supreme Court Justice) (by cross reference to § 1111); § 794 (1982 ed. and Supp. V) (espionage); § 844(f) (1982 ed., Supp. V) (destruction of Government property resulting in death); § 1111 (first-degree murder within federal jurisdiction); § 1716 (1982 ed. and Supp. V) (mailing of injurious articles resulting in death); § 1751 (assassination or kidnaping resulting in death of President or Vice President); § 1992 (willful wrecking of train resulting in death); § 2113 (1982 ed. and Supp. V) (bank robbery-related murder or kidnaping); § 2381 (treason); 49 U. S. C. App. §§ 1472 and 1473 (1982 ed. and Supp. V) (death resulting from aircraft hijacking).

federal statute permitted the execution of persons under 18, that would not remotely establish—in the face of a substantial number of state statutes to the contrary—a national consensus that such punishment is inhumane, any more than the absence of a federal lottery establishes a national consensus that lotteries are socially harmful. To be sure, the absence of a federal death penalty for 16- or 17-year-olds (if it existed) might be evidence that there is no national consensus *in favor* of such punishment. It is not the burden of Kentucky and Missouri, however, to establish a national consensus approving what their citizens have voted to do; rather, it is the "heavy burden" of petitioners, *Gregg* v. *Georgia*, 428 U. S., at 175, to establish a national consensus *against* it. As far as the primary and most reliable indication of consensus is concerned—the pattern of enacted laws—petitioners have failed to carry that burden.

IV

A

Wilkins and Stanford argue, however, that even if the laws themselves do not establish a settled consensus, the application of the laws does. That contemporary society views capital punishment of 16- and 17-year-old offenders as inappropriate is demonstrated, they say, by the reluctance of juries to impose, and prosecutors to seek, such sentences. Petitioners are quite correct that a far smaller number of offenders under 18 than over 18 have been sentenced to death in this country. From 1982 through 1988, for example, out of 2,106 total death sentences, only 15 were imposed on individuals who were 16 or under when they committed their crimes, and only 30 on individuals who were 17 at the time of the crime. See Streib, Imposition of Death Sentences For Juvenile Offenses, January 1, 1982, Through April 1, 1989, p. 2 (paper for Cleveland-Marshall College of Law, April 5, 1989). And it appears that actual executions for crimes committed under age 18 accounted for only about two percent of the total number of executions that occurred between 1642

and 1986. See Streib, Death Penalty for Juveniles, at 55, 57. As Wilkins points out, the last execution of a person who committed a crime under 17 years of age occurred in 1959. These statistics, however, carry little significance. Given the undisputed fact that a far smaller percentage of capital crimes are committed by persons under 18 than over 18, the discrepancy in treatment is much less than might seem. Granted, however, that a substantial discrepancy exists, that does not establish the requisite proposition that the death sentence for offenders under 18 is categorically unacceptable to prosecutors and juries. To the contrary, it is not only possible, but overwhelmingly probable, that the very considerations which induce petitioners and their supporters to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed.

B

This last point suggests why there is also no relevance to the laws cited by petitioners and their *amici* which set 18 or more as the legal age for engaging in various activities, ranging from driving to drinking alcoholic beverages to voting. It is, to begin with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards. But even if the requisite degrees of maturity were comparable, the age statutes in question would still not be relevant. They do not represent a social judgment that all persons under the designated ages are not responsible enough to drive, to drink, or to vote, but at most a judgment that the vast majority are not. These laws set the appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individualized maturity tests for each driver, drinker, or voter. The

criminal justice system, however, does provide individualized testing. In the realm of capital punishment in particular, "individualized consideration [is] a constitutional requirement," *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (opinion of Burger, C. J.) (footnote omitted); see also *Zant* v. *Stephens*, 462 U. S. 862, 879 (1983) (collecting cases), and one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age, see *Eddings* v. *Oklahoma*, 455 U. S. 104, 115–116 (1982). Twenty-nine States, including both Kentucky and Missouri, have codified this constitutional requirement in laws specifically designating the defendant's age as a mitigating factor in capital cases.[5] Moreover, the determinations required by juvenile transfer statutes to certify a juvenile for trial as an adult ensure individualized consideration of the maturity and moral responsibility of 16- and 17-year-old offenders before they are even held to stand trial as adults.[6] The application of this

[5] See Ala. Code § 13A–5–51(7) (1982); Ariz. Rev. Stat. Ann. § 13–703(G)(5) (Supp. 1988); Ark. Code Ann. § 5–4–605(4) (1987); Cal. Penal Code Ann. § 190.3(i) (West 1988); Colo. Rev. Stat. § 16–11–103(5)(a) (1986); Conn. Gen. Stat. § 53a–46a(g)(1) (1989); Fla. Stat. § 921.141(6)(g) (1987); Ind. Code § 35–50–2–9(c)(7) (1988); Ky. Rev. Stat. Ann. § 532.025(2)(b)(8) (Baldwin 1988); La. Code Crim. Proc. Ann., Art. 905.5(f) (West 1984); Md. Ann. Code, Art. 27, § 413(g)(5) (1988); Miss. Code Ann. § 99–19–101(6)(g) (Supp. 1988); Mo. Rev. Stat. § 565.032(3)(7) (1986); Mont. Code Ann. § 46–18–304(7) (1987); Neb. Rev. Stat. § 29–2523(2)(d) (1985); Nev. Rev. Stat. § 200.035(6) (1987); N. H. Rev. Stat. Ann. § 630:5(II)(b)(5) (1986); N. J. Stat. Ann. § 2C:11–3(c)(5)(c) (West Supp. 1988); N. M. Stat. Ann. § 31–20A–6(I) (1987); N. C. Gen. Stat. § 15A–2000(f)(7) (1988); Ohio Rev. Code Ann. § 2929.04(B)(4) (1987); Ore. Rev. Stat. § 163.150(1)(b)(B) (1987); 42 Pa. Cons. Stat. § 9711(e)(4) (1982); S. C. Code § 16–3–20(C)(b)(9) (Supp. 1988); Tenn. Code Ann. § 39–2–203(j)(7) (1982); Utah Code Ann. § 76–3–207 (2)(e) (Supp. 1988); Va. Code § 19.2–264.4(B)(v) (1983); Wash. Rev. Code § 10.95.070(7) (Supp. 1989); Wyo. Stat. § 6–2–102(j)(vii) (1988).

[6] The Kentucky statute under which Stanford was certified to be tried as an adult provides in relevant part:

"(3) If the court determines that probable cause exists [to believe that a person 16 years old or older committed a felony or that a person under 16 years of age committed a Class A felony or a capital offense], it shall then

particularized system to the petitioners can be declared constitutionally inadequate only if there is a consensus, not that 17 or 18 is the age at which most persons, or even almost all persons, achieve sufficient maturity to be held fully responsible for murder; but that 17 or 18 is the age before which *no one* can reasonably be held fully responsible. What displays society's views on this latter point are not the ages set forth in the generalized system of driving, drinking, and voting laws cited by petitioners and their *amici*, but the ages at

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determine if it is in the best interest of the child and the community to order such a transfer based upon the seriousness of the alleged offense; whether the offense was against person or property, with greater weight being given to offenses against persons; the maturity of the child as determined by his environment; the child's prior record; and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system." Ky. Rev. Stat. Ann. § 208.170 (Michie 1982) (repealed effective July 15, 1984).

The Missouri statute under which Wilkins was certified provides that in determining whether to transfer a juvenile the court must consider:

"(1) The seriousness of the offense alleged and whether the protection of the community requires transfer to the court of general jurisdiction;

"(2) Whether the offense alleged involved viciousness, force and violence;

"(3) Whether the offense alleged was against persons or property with greater weight being given to the offense against persons, especially if personal injury resulted;

"(4) Whether the offense alleged is a part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation under the juvenile code;

"(5) The record and history of the child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions and other placements;

"(6) The sophistication and maturity of the child as determined by consideration of his home and environmental situation, emotional condition and pattern of living;

"(7) The program and facilities available to the juvenile court in considering disposition; and

"(8) Whether or not the child can benefit from the treatment or rehabilitative programs available to the juvenile court." Mo. Rev. Stat. § 211.071(6) (1986).

which the States permit their particularized capital punishment systems to be applied.[7]

V

Having failed to establish a consensus against capital punishment for 16- and 17-year-old offenders through state and federal statutes and the behavior of prosecutors and juries, petitioners seek to demonstrate it through other indicia, including public opinion polls, the views of interest groups, and the positions adopted by various professional associations. We decline the invitation to rest constitutional law upon such uncertain foundations. A revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved.

We also reject petitioners' argument that we should invalidate capital punishment of 16- and 17-year-old offenders on the ground that it fails to serve the legitimate goals of penology. According to petitioners, it fails to deter because juveniles, possessing less developed cognitive skills than adults, are less likely to fear death; and it fails to exact just retribution because juveniles, being less mature and responsible, are also less morally blameworthy. In support of these claims, petitioners and their supporting *amici* marshal an array of

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[7] The dissent believes that individualized consideration is no solution, because "the Eighth Amendment requires that a person who lacks that full degree of responsibility for his or her actions associated with adulthood not be sentenced to death," and this absolute cannot be assured if "a juvenile offender's level of responsibility [is] taken into account only along with a host of other factors that the court or jury may decide outweigh that want of responsibility." *Post*, at 397. But it is equally true that individualized consideration will not absolutely assure immunity from the death penalty to the *non*juvenile who happens to be immature. If individualized consideration is constitutionally inadequate, then, the only logical conclusion is that *everyone* is exempt from the death penalty.

socioscientific evidence concerning the psychological and emotional development of 16- and 17-year-olds.

If such evidence could conclusively establish the entire lack of deterrent effect and moral responsibility, resort to the Cruel and Unusual Punishments Clause would be unnecessary; the Equal Protection Clause of the Fourteenth Amendment would invalidate these laws for lack of rational basis. See *Dallas* v. *Stanglin*, 490 U. S. 19 (1989). But as the adjective "socioscientific" suggests (and insofar as evaluation of moral responsibility is concerned perhaps the adjective "ethicoscientific" would be more apt), it is not demonstrable that no 16-year-old is "adequately responsible" or significantly deterred. It is rational, even if mistaken, to think the contrary. The battle must be fought, then, on the field of the Eighth Amendment; and in that struggle socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon. The punishment is either "cruel *and* unusual" (*i. e.*, society has set its face against it) or it is not. The audience for these arguments, in other words, is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded. For as we stated earlier, our job is to *identify* the "evolving standards of decency"; to determine, not what they *should* be, but what they *are*. We have no power under the Eighth Amendment to substitute our belief in the scientific evidence for the society's apparent skepticism. In short, we emphatically reject petitioner's suggestion that the issues in this case permit us to apply our "own informed judgment," Brief for Petitioner in No. 87–6026, p. 23, regarding the desirability of permitting the death penalty for crimes by 16- and 17-year-olds.

We reject the dissent's contention that our approach, by "largely return[ing] the task of defining the contours of Eighth Amendment protection to political majorities," leaves "'[c]onstitutional doctrine [to] be formulated by the acts of those institutions which the Constitution is supposed to limit,'" *post*, at 391, 392 (citation omitted). When this Court

cast loose from the historical moorings consisting of the original application of the Eighth Amendment, it did not embark rudderless upon a wide-open sea. Rather, it limited the Amendment's extension to those practices contrary to the "evolving *standards* of decency that mark the progress of a maturing *society*." *Trop* v. *Dulles*, 356 U. S., at 101 (plurality opinion) (emphasis added). It has never been thought that this was a shorthand reference to the preferences of a majority of this Court. By reaching a decision supported neither by constitutional text nor by the demonstrable current standards of our citizens, the dissent displays a failure to appreciate that "those institutions which the Constitution is supposed to limit" include the Court itself. To say, as the dissent says, that "'it is for *us* ultimately to judge whether the Eighth Amendment permits imposition of the death penalty,'" *post*, at 391 (emphasis added), quoting *Enmund* v. *Florida*, 458 U. S., at 797—and to mean that as the dissent means it, *i. e.*, that it is for *us* to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think "proportionate" and "measurably contributory to acceptable goals of punishment"—to say and mean that, is to replace judges of the law with a committee of philosopher-kings.

While the dissent is correct that several of our cases have engaged in so-called "proportionality" analysis, examining whether "there is a disproportion 'between the punishment imposed and the defendant's blameworthiness,'" and whether a punishment makes any "measurable contribution to acceptable goals of punishment," see *post*, at 393, we have never invalidated a punishment on this basis alone. All of our cases condemning a punishment under this mode of analysis also found that the objective indicators of state laws or jury determinations evidenced a societal consensus against that penalty. See *Solem* v. *Helm*, 463 U. S., at 299–300;

Enmund v. *Florida*, *supra*, at 789–796; *Coker* v. *Georgia*, 433 U. S., at 593–597 (plurality opinion). In fact, the two methodologies blend into one another, since "proportionality" analysis itself can only be conducted on the basis of the standards set by our own society; the only alternative, once again, would be our personal preferences.

* * *

We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment.

The judgments of the Supreme Court of Kentucky and the Supreme Court of Missouri are therefore

Affirmed.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

Last Term, in *Thompson* v. *Oklahoma*, 487 U. S. 815, 857–858 (1988) (opinion concurring in judgment), I expressed the view that a criminal defendant who would have been tried as a juvenile under state law, but for the granting of a petition waiving juvenile court jurisdiction, may only be executed for a capital offense if the State's capital punishment statute specifies a minimum age at which the commission of a capital crime can lead to an offender's execution and the defendant had reached that minimum age at the time the crime was committed. As a threshold matter, I indicated that such specificity is not necessary to avoid constitutional problems if it is clear that no national consensus forbids the imposition of capital punishment for crimes committed at such an age. *Id.*, at 857. Applying this two-part standard in *Thompson*, I concluded that Oklahoma's imposition of a death sentence on an individual who was 15 years old at the time he committed a capital offense should be set aside. Applying the same

standard today, I conclude that the death sentences for capital murder imposed by Missouri and Kentucky on petitioners Wilkins and Stanford respectively should not be set aside because it is sufficiently clear that no national consensus forbids the imposition of capital punishment on 16- or 17-year-old capital murderers.

In *Thompson* I noted that "[t]he most salient statistic that bears on this case is that every single American legislature that has expressly set a minimum age for capital punishment has set that age at 16 or above." *Id.*, at 849. It is this difference between *Thompson* and these cases, more than any other, that convinces me there is no national consensus forbidding the imposition of capital punishment for crimes committed at the age of 16 and older. See *ante*, at 370–372. As the Court indicates, "a majority of the States that permit capital punishment authorize it for crimes committed at age 16 or above . . . ." *Ante*, at 371. Three States, including Kentucky, have specifically set the minimum age for capital punishment at 16, see Ind. Code § 35–50–2–3(b) (1988); Ky. Rev. Stat. Ann. § 640.040(1) (Baldwin 1987); Nev. Rev. Stat. § 176.025 (1987), and a fourth, Florida, clearly contemplates the imposition of capital punishment on 16-year-olds in its juvenile transfer statute, see Fla. Stat. § 39.02(5)(c) (1987). Under these circumstances, unlike the "peculiar circumstances" at work in *Thompson*, I do not think it necessary to require a state legislature to specify that the commission of a capital crime can lead to the execution of a 16- or 17-year-old offender. Because it is sufficiently clear that today no national consensus forbids the imposition of capital punishment in these circumstances, "the implicit nature of the [Missouri] Legislature's decision [is] not . . . constitutionally problematic." 487 U. S., at 857. This is true, *a fortiori*, in the case of Kentucky, which has specified 16 as the minimum age for the imposition of the death penalty. The day may come when there is such general legislative rejection of the execution of 16- or 17-year-old capital murderers that a clear na-

tional consensus can be said to have developed. Because I do not believe that day has yet arrived, I concur in Parts I, II, III, and IV–A of the Court's opinion, and I concur in its judgment.

I am unable, however, to join the remainder of the plurality's opinion for reasons I stated in *Thompson*. Part V of the plurality's opinion "emphatically reject[s]," *ante*, at 378, the suggestion that, beyond an assessment of the specific enactments of American legislatures, there remains a constitutional obligation imposed upon this Court to judge whether the "'nexus between the punishment imposed and the defendant's blameworthiness'" is proportional. *Thompson*, *supra*, at 853, quoting *Enmund* v. *Florida*, 458 U. S. 782, 825 (1982) (O'CONNOR, J., dissenting). Part IV–B of the plurality's opinion specifically rejects as irrelevant to Eighth Amendment considerations state statutes that distinguish juveniles from adults for a variety of other purposes. In my view, this Court does have a constitutional obligation to conduct proportionality analysis. See *Penry* v. *Lynaugh*, *ante*, at 335–340; *Tison* v. *Arizona*, 481 U. S. 137, 155–158 (1987); *Enmund*, 458 U. S., at 797–801; *id.*, at 825–826 (O'CONNOR, J., dissenting). In *Thompson* I specifically identified age-based statutory classifications as "relevant to Eighth Amendment proportionality analysis." 487 U. S., at 854 (opinion concurring in judgment). Thus, although I do not believe that these particular cases can be resolved through proportionality analysis, see *Thompson*, *supra*, at 853–854, I reject the suggestion that the use of such analysis is improper as a matter of Eighth Amendment jurisprudence. Accordingly, I join all but Parts IV–B and V of JUSTICE SCALIA's opinion.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

I believe that to take the life of a person as punishment for a crime committed when below the age of 18 is cruel and unusual and hence is prohibited by the Eighth Amendment.

The method by which this Court assesses a claim that a punishment is unconstitutional because it is cruel and unusual is established by our precedents, and it bears little resemblance to the method four Members of the Court apply in this case. To be sure, we *begin* the task of deciding whether a punishment is unconstitutional by reviewing legislative enactments and the work of sentencing juries relating to the punishment in question to determine whether our Nation has set its face against a punishment to an extent that it can be concluded that the punishment offends our "evolving standards of decency." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion). The Court undertakes such an analysis in this case. *Ante*, at 370–373. But JUSTICE SCALIA, in his plurality opinion on this point, *ante*, at 374–380, would treat the Eighth Amendment inquiry as *complete* with this investigation. I agree with JUSTICE O'CONNOR, *ante*, at 382, that a more searching inquiry is mandated by our precedents interpreting the Cruel and Unusual Punishments Clause. In my view, that inquiry must in these cases go beyond age-based statutory classifications relating to matters other than capital punishment, cf. *ibid.* (O'CONNOR, J., concurring in part and concurring in judgment), and must also encompass what JUSTICE SCALIA calls, with evident but misplaced disdain, "ethicoscientific" evidence. Only then can we be in a position to judge, as our cases require, whether a punishment is unconstitutionally excessive, either because it is disproportionate given the culpability of the offender, or because it serves no legitimate penal goal.

I

Our judgment about the constitutionality of a punishment under the Eighth Amendment is informed, though not determined, see *infra*, at 391, by an examination of contemporary attitudes toward the punishment, as evidenced in the actions of legislatures and of juries. *McCleskey* v. *Kemp*, 481 U. S. 279, 300 (1987); *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977)

(plurality opinion). The views of organizations with expertise in relevant fields and the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society.

A

The Court's discussion of state laws concerning capital sentencing, *ante*, at 370–372, gives a distorted view of the evidence of contemporary standards that these legislative determinations provide. Currently, 12 of the States whose statutes permit capital punishment specifically mandate that offenders under age 18 not be sentenced to death. *Ante*, at 370–371, n. 2. When one adds to these 12 States the 15 (including the District of Columbia) in which capital punishment is not authorized at all,[1] it appears that the governments in fully 27 of the States have concluded that no one under 18 should face the death penalty. A further three States explicitly refuse to authorize sentences of death for those who committed their offense when under 17, *ante*, at 370, n. 2, making a total of 30 States that would not tolerate the execution of petitioner Wilkins. Congress' most recent enactment of a death penalty statute also excludes those under 18.

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[1] See *Thompson* v. *Oklahoma*, 487 U. S. 815, 826, and n. 25 (1988), listing 14 States. The 15th State to have rejected capital punishment altogether is Vermont. Vermont repealed a statute that had allowed capital punishment for some murders. See Vt. Stat. Ann., Tit. 13, § 2303 (1974 and Supp. 1988). The State now provides for the death penalty only for kidnaping with intent to extort money. § 2403. Insofar as it permits a sentence of death, § 2403 was rendered unconstitutional by our decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), because Vermont's sentencing scheme does not guide jury discretion, see Vt. Stat. Ann., Tit. 13, §§ 7101–7107 (1974). Vermont's decision not to amend its only law allowing the death penalty in light of *Furman* and its progeny, in combination with its repeal of its statute permitting capital punishment for murder, leads to the conclusion that the State rejects capital punishment.

In addition, South Dakota, though it statutorily provides for a death penalty, has sentenced no one to death since *Furman*, arguably making a 28th State that has abandoned the death penalty.

Pub. L. 100–690, § 7001(l), 102 Stat. 4390, 21 U. S. C. § 848(*l*) (1988 ed.).

In 19 States that have a death penalty, no minimum age for capital sentences is set in the death penalty statute. See *Thompson* v. *Oklahoma*, 487 U. S. 815, 826–827, and n. 26 (1988), and n. 1, *supra*. The notion that these States have consciously authorized the execution of juveniles derives from the congruence in those jurisdictions of laws permitting state courts to hand down death sentences, on the one hand, and, on the other, statutes permitting the transfer of offenders under 18 from the juvenile to state court systems for trial in certain circumstances. See *Thompson*, *supra*, at 867–868, and n. 3 (SCALIA, J., dissenting). I would not assume, however, in considering how the States stand on the moral issue that underlies the constitutional question with which we are presented, that a legislature that has never specifically considered the issue has made a conscious moral choice to permit the execution of juveniles. See 487 U. S., at 826–827, n. 24 (plurality opinion). On a matter of such moment that most States have expressed an explicit and contrary judgment, the decisions of legislatures that are only implicit, and that lack the "earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty," *id.*, at 857 (O'CONNOR, J., concurring in judgment), must count for little. I do not suggest, of course, that laws of these States cut *against* the constitutionality of the juvenile death penalty—only that accuracy demands that the baseline for our deliberations should be that 27 States refuse to authorize a sentence of death in the circumstances of petitioner Stanford's case, and 30 would not permit Wilkins' execution; that 19 States have not squarely faced the question; and that only the few remaining jurisdictions have explicitly set an age below 18 at which a person may be sentenced to death.

B

The application of these laws is another indicator the Court agrees to be relevant. The fact that juries have on occasion

sentenced a minor to death shows, the Court says, that the death penalty for adolescents is not categorically unacceptable to juries. *Ante*, at 374. This, of course, is true; but it is not a conclusion that takes Eighth Amendment analysis very far. Just as we have never insisted that a punishment have been rejected unanimously by the States before we may judge it cruel and unusual, so we have never adopted the extraordinary view that a punishment is beyond Eighth Amendment challenge if it is sometimes handed down by a jury. See, *e. g.*, *Enmund* v. *Florida*, 458 U. S. 782, 792 (1982) (holding the death penalty cruel and unusual punishment for participation in a felony in which an accomplice commits murder, though about a third of American jurisdictions authorized such punishment, and at least six nontriggerman felony murderers had been executed, and three others were on death rows); *Coker* v. *Georgia*, 433 U. S., at 596–597 (holding capital punishment unconstitutional for the rape of an adult woman, though 72 persons had been executed for rape in this country since 1955, see *Enmund*, *supra*, at 795, and though Georgia juries handed down six death sentences for rape between 1973 and 1977). *Enmund* and *Coker* amply demonstrate that it is no "requisite" of finding an Eighth Amendment violation that the punishment in issue be "categorically unacceptable to prosecutors and juries," *ante*, at 374—and, evidently, resort to the Cruel and Unusual Punishments Clause would not be necessary to test a sentence never imposed because categorically unacceptable to juries.

Both in absolute and in relative terms, imposition of the death penalty on adolescents is distinctly unusual. Adolescent offenders make up only a small proportion of the current death-row population: 30 out of a total of 2,186 inmates, or 1.37 percent. NAACP Legal Defense and Educational Fund, Inc. (LDF), Death Row, U. S. A. (Mar. 1, 1989).[2]

[2] One person currently on death row for juvenile crimes was sentenced in Maryland, which has since set 18 as the minimum age for its death penalty.

Eleven minors were sentenced to die in 1982; nine in 1983; six in 1984; five in 1985; seven in 1986; and two in 1987. App. N to Brief for the Office of the Capital Collateral Representative for the State of Florida as *Amicus Curiae* (hereafter OCCR Brief). Forty-one, or 2.3 percent, of the 1,813 death sentences imposed between January 1, 1982, and June 30, 1988, were for juvenile crimes. *Id.*, at 15, and App. R. And juvenile offenders are significantly less likely to receive the death penalty than adults. During the same period, there were 97,086 arrests of adults for homicide, and 1,772 adult death sentences, or 1.8 percent; and 8,911 arrests of minors for homicide, compared to 41 juvenile death sentences, or 0.5 percent. *Ibid.*, and Apps. Q and R.[3]

The Court speculates that this very small number of capital sentences imposed on adolescents indicates that juries have considered the youth of the offender when determining sentence, and have reserved the punishment for rare cases in which it is nevertheless appropriate. *Ante*, at 374. The State of Georgia made a very similar and equally conjectural argument in *Coker*—that "as a practical matter juries simply reserve the extreme sanction for extreme cases of rape, and that recent experience . . . does not prove that jurors consider the death penalty to be a disproportionate punishment for every conceivable instance of rape." 433 U. S., at 597. This Court, however, summarily rejected this claim, noting simply that in the vast majority of cases, Georgia juries had not imposed the death sentence for rape. It is certainly true that in the vast majority of cases, juries have not sentenced juveniles to death, and it seems to me perfectly proper to conclude that a sentence so rarely imposed is "unusual."

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[3] Capital sentences for juveniles would presumably be more unusual still were capital juries drawn from a cross section of our society, rather than excluding many who oppose capital punishment, see *Lockhart* v. *McCree*, 476 U. S. 162 (1986)—a fact that renders capital jury sentences a distinctly weighted measure of contemporary standards.

C

Further indicators of contemporary standards of decency that should inform our consideration of the Eighth Amendment question are the opinions of respected organizations. *Thompson*, 487 U. S., at 830 (plurality opinion). Where organizations with expertise in a relevant area have given careful consideration to the question of a punishment's appropriateness, there is no reason why that judgment should not be entitled to attention as an indicator of contemporary standards. There is no dearth of opinion from such groups that the state-sanctioned killing of minors is unjustified. A number, indeed, have filed briefs *amicus curiae* in these cases, in support of petitioners.[4] The American Bar Association has adopted a resolution opposing the imposition of capital punishment upon any person for an offense committed while under age 18,[5] as has the National Council of Juvenile

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[4] Briefs for American Bar Association; Child Welfare League of America, National Parents and Teachers Association, National Council on Crime and Delinquency, Children's Defense Fund, National Association of Social Workers, National Black Child Development Institute, National Network of Runaway and Youth Services, National Youth Advocate Program, and American Youth Work Center; American Society for Adolescent Psychiatry and American Orthopsychiatric Association; Defense for Children International–USA; National Legal Aid and Defender Association, and National Association of Criminal Defense Lawyers; Office of Capital Collateral Representative for the State of Florida; and International Human Rights Law Group, as *Amici Curiae*. See also Briefs for American Baptist Churches, American Friends Service Committee, American Jewish Committee, American Jewish Congress, Christian Church (Disciples of Christ), Mennonite Central Committee, General Conference Mennonite Church, National Council of Churches, General Assembly of the Presbyterian Church, Southern Christian Leadership Conference, Union of American Hebrew Congregations, United Church of Christ Commission for Racial Justice, United Methodist Church General Board of Church and Society, and United States Catholic Conference; West Virginia Council of Churches; and Amnesty International as *Amici Curiae*.

[5] American Bar Association, Summary of Action of the House of Delegates 17 (1983 Annual Meeting).

and Family Court Judges.[6] The American Law Institute's Model Penal Code similarly includes a lower age limit of 18 for the death sentence.[7] And the National Commission on Reform of the Federal Criminal Laws also recommended that 18 be the minimum age.[8]

Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis. *Thompson*, *supra*, at 830–831; *Enmund*, 458 U. S., at 796, n. 22; *Coker*, *supra*, at 596, n. 10; *Trop* v. *Dulles*, 356 U. S., at 102, and n. 35. Many countries, of course—over 50, including nearly all in Western Europe—have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason. App. to Brief for Amnesty International as *Amicus Curiae*. Twenty-seven others do not in practice impose the penalty. *Ibid.* Of the nations that retain capital punishment, a majority—65—prohibit the execution of juveniles. *Ibid.* Sixty-one countries retain capital punishment and have no statutory provision exempting juveniles, though some of these nations are ratifiers of international treaties that do prohibit the execution of juveniles. *Ibid.* Since 1979, Amnesty International has recorded only eight executions of offenders under 18 throughout the world, three of these in the United States. The other five executions were carried out in Pakistan, Bangladesh, Rwanda, and Barbados.[9] In addition to national laws, three leading human rights treaties ratified or signed by the United States

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[6] National Council of Juvenile and Family Court Judges, Juvenile and Family Court Newsletter, Vol. 19, No. 1, p. 4 (Oct. 1988).

[7] American Law Institute, Model Penal Code § 210.6(1)(d) (Proposed Official Draft 1962); American Law Institute, Model Penal Code and Commentaries § 210.6, Commentary, p. 133 (1980) ("[C]ivilized societies will not tolerate the spectacle of execution of children").

[8] National Commission on Reform of Federal Criminal Laws, Final Report of the Proposed New Federal Criminal Code § 3603 (1971).

[9] Brief for Amnesty International as *Amicus Curiae* in *Thompson* v. *Oklahoma*, O. T. 1987, No. 86–6169, p. 6.

explicitly prohibit juvenile death penalties.[10] Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.

D

Together, the rejection of the death penalty for juveniles by a majority of the States, the rarity of the sentence for juveniles, both as an absolute and a comparative matter, the decisions of respected organizations in relevant fields that this punishment is unacceptable, and its rejection generally throughout the world, provide to my mind a strong grounding for the view that it is not constitutionally tolerable that certain States persist in authorizing the execution of adolescent offenders. It is unnecessary, however, to rest a view that the Eighth Amendment prohibits the execution of minors solely upon a judgment as to the meaning to be attached to the evidence of contemporary values outlined above, for the execution of juveniles fails to satisfy two well-established and independent Eighth Amendment requirements—that a

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[10] Article 6(5) of the International Covenant on Civil and Political Rights, Annex to G. A. Res. 2200, 21 U. N. GAOR Res. Supp. (No. 16) 53, U. N. Doc. A/6316 (1966) (signed but not ratified by the United States), reprinted in 6 International Legal Material 368, 370 (1967); Article 4(5) of the American Convention on Human Rights, O. A. S. Official Records, OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 (1970) (same), reprinted in 9 International Legal Material 673, 676 (1970); Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U. S. T. 3516, T. I. A. S. No. 3365 (ratified by the United States). See also Resolutions and Decisions of the United Nations Economic and Social Council, Res. 1984/50, U. N. ESCOR Supp. (No. 1), p. 33, U. N. Doc. E/1984/84 (1984) (adopting "safeguards guaranteeing protection of the rights of those facing the death penalty," including the safeguard that "[p]ersons below 18 years of age at the time of the commission of the crime shall not be sentenced to death"), endorsed by the United Nations General Assembly, U. N. GAOR Res. 39/118, U. N. Doc. A/39/51, p. 211, ¶¶ 2, 5 (1985), and adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, p. 83, U. N. Doc. A/Conf. 121/22, U. N. Sales No. E.86.IV.1 (1986).

punishment not be disproportionate, and that it make a contribution to acceptable goals of punishment.

II

JUSTICE SCALIA forthrightly states in his plurality opinion that Eighth Amendment analysis is at an end once legislation and jury verdicts relating to the punishment in question are analyzed as indicators of contemporary values. A majority of the Court rejected this revisionist view as recently as last Term, see *Thompson*, 487 U. S., at 833–838 (plurality opinion); *id.*, at 853–854 (opinion of O'CONNOR, J.), and does so again in this case and in *Penry* v. *Lynaugh*, *ante*, p. 302. We need not and should not treat this narrow range of factors as determinative of our decision whether a punishment violates the Constitution because it is excessive.

The Court has explicitly stated that "the attitude of state legislatures and sentencing juries do *not* wholly determine" a controversy arising under the Eighth Amendment, *Coker*, 433 U. S., at 597 (plurality opinion) (emphasis added), because "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the [constitutional] acceptability of" a punishment, *ibid.* See also *id.*, at 603–604, n. 2 (Powell, J., concurring in judgment) ("[T]he ultimate decision as to the appropriateness of the death penalty under the Eighth Amendment . . . must be decided on the basis of our own judgment in light of the precedents of this Court"); *Enmund*, *supra*, at 797 ("Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty" in a particular class of cases).

JUSTICE SCALIA's approach would largely return the task of defining the contours of Eighth Amendment protection to political majorities. But

> "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and

> officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943).

Compare *ante*, at 375–377, with *Whitley* v. *Albers*, 475 U. S. 312, 318 (1986) ("The language of the Eighth Amendment . . . manifests 'an intention to limit the power of those entrusted with the criminal-law function of government' "). The promise of the Bill of Rights goes unfulfilled when we leave "[c]onstitutional doctrine [to] be formulated by the acts of those institutions which the Constitution is supposed to limit," Radin, The Jurisprudence of Death, 126 U. Pa. L. Rev. 989, 1036 (1978), as is the case under JUSTICE SCALIA's positivist approach to the definition of citizens' rights. This Court abandons its proven and proper role in our constitutional system when it hands back to the very majorities the Framers distrusted the power to define the precise scope of protection afforded by the Bill of Rights, rather than bringing its own judgment to bear on that question, after complete analysis.

Despite JUSTICE SCALIA's view to the contrary, however,

> "our cases . . . make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' . . . This means, at least, that the punishment not be 'excessive.' . . . [T]he inquiry into 'excessiveness' has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. . . . Second, the punishment must not be grossly out of proportion to the severity of the crime." *Gregg* v. *Georgia*, 428 U. S. 153, 173 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.).

Thus, in addition to asking whether legislative or jury rejection of a penalty shows that "society has set its face against it," *ante*, at 378, the Court asks whether "a punishment is 'excessive' and unconstitutional" because there is disproportion "between the punishment imposed and the defendant's blameworthiness," *ante*, at 382 (opinion of O'CONNOR, J.), or because it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering," *Coker*, *supra*, at 592 (plurality opinion). See, *e. g.*, *Penry*, *ante*, at 335 (opinion of O'CONNOR, J.); *ante*, at 342–343 (BRENNAN, J., concurring in part and dissenting in part).

III

There can be no doubt at this point in our constitutional history that the Eighth Amendment forbids punishment that is wholly disproportionate to the blameworthiness of the offender. "The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." *Solem* v. *Helm*, 463 U. S. 277, 286 (1983). Usually formulated as a requirement that sentences not be "disproportionate to the crime committed," *id.*, at 284; see, *e. g.*, *Weems* v. *United States*, 217 U. S. 349 (1910); *O'Neil* v. *Vermont*, 144 U. S. 323, 339–340 (1892) (Field, J., dissenting), the proportionality principle takes account not only of the "injury to the person and to the public" caused by a crime, but also of the "moral depravity" of the offender. *Coker*, *supra*, at 598. The offender's culpability for his criminal acts—"the degree of the defendant's blameworthiness," *Enmund*, 458 U. S., at 815 (O'CONNOR, J., dissenting); see also *id.*, at 798 (opinion of the Court)—is thus of central importance to the constitutionality of the sentence imposed. Indeed, this focus on a defendant's blameworthiness runs throughout our constitutional jurisprudence relating to capital sentencing. See, *e. g.*, *Booth* v. *Maryland*, 482 U. S. 496, 502 (1987) (striking down state statute requiring consideration by sentencer of evidence other than defendant's record and characteristics and the cir-

cumstances of the crime, which had no "bearing on the defendant's 'personal responsibility and moral guilt'"); *California* v. *Brown*, 479 U. S. 538, 545 (1987) (an "emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence. . . . *Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant") (O'CONNOR, J., concurring).

Proportionality analysis requires that we compare "the gravity of the offense," understood to include not only the injury caused, but also the defendant's culpability, with "the harshness of the penalty." *Solem*, *supra*, at 292. In my view, juveniles so generally lack the degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty that the Eighth Amendment forbids that they receive that punishment.

A

Legislative determinations distinguishing juveniles from adults abound. These age-based classifications reveal much about how our society regards juveniles as a class, and about societal beliefs regarding adolescent levels of responsibility. See *Thompson*, 487 U. S., at 823–825 (plurality opinion).

The participation of juveniles in a substantial number of activities open to adults is either barred completely or significantly restricted by legislation. All States but two have a uniform age of majority, and have set that age at 18 or above. OCCR Brief, App. A. No State has lowered its voting age below 18. *Id.*, App. C; see *Thompson*, *supra*, at 839, App. A. Nor does any State permit a person under 18 to serve on a jury. OCCR Brief, App. B; see *Thompson*, *supra*, at 840, App. B. Only four States ever permit persons below 18 to marry without parental consent. OCCR Brief, App. D; see *Thompson*, *supra*, at 843, App. D. Thirty-seven States have specific enactments requiring that a patient have attained 18 before she may validly consent to medical treatment. OCCR Brief, App. E. Thirty-four

States require parental consent before a person below 18 may drive a motor car. *Id.*, App. F; see *Thompson*, *supra*, at 842, App. C. Legislation in 42 States prohibits those under 18 from purchasing pornographic materials. OCCR Brief, App. G; see *Thompson*, *supra*, at 845, App. E. Where gambling is legal, adolescents under 18 are generally not permitted to participate in it, in some or all of its forms. OCCR Brief, App. H; see *Thompson*, *supra*, at 847, App. F. In these and a host of other ways, minors are treated differently from adults in our laws, which reflects the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life.

"The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson*, *supra*, at 835 (plurality opinion). Adolescents "are more vulnerable, more impulsive, and less self-disciplined than adults," and are without the same "capacity to control their conduct and to think in long-range terms." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978) (hereafter Task Force). They are particularly impressionable and subject to peer pressure, see *Eddings* v. *Oklahoma*, 455 U. S. 104, 115 (1982), and prone to "experiment, risk-taking and bravado," Task Force 3. They lack "experience, perspective, and judgment." *Bellotti* v. *Baird*, 443 U. S. 622, 635 (1979). See generally *Thompson*, *supra*, at 43–44, n. 43; Brief for American Society for Adolescent Psychiatry et al. as *Amici Curiae* (reviewing scientific evidence). Moreover, the very paternalism that our society shows toward youths and the dependency it forces upon them mean that society bears a responsibility for the actions of juveniles that it does not for the actions of adults who are at least theoretically free to make their own choices: "youth crime . . . is not exclusively the offender's fault; offenses by

the young represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." Task Force 7.

To be sure, the development of cognitive and reasoning abilities and of empathy, the acquisition of experience upon which these abilities operate and upon which the capacity to make sound value judgments depends, and in general the process of maturation into a self-directed individual fully responsible for his or her actions, occur by degrees. See, *e. g.*, G. Manaster, Adolescent Development and the Life Tasks (1977). But the factors discussed above indicate that 18 is the dividing line that society has generally drawn, the point at which it is thought reasonable to assume that persons have an ability to make, and a duty to bear responsibility for their, judgments. Insofar as age 18 is a necessarily arbitrary social choice as a point at which to acknowledge a person's maturity and responsibility, given the different developmental rates of individuals, it is in fact "a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s." Brief for American Society for Adolescent Psychiatry et al. as *Amici Curiae* 4 (citing social scientific studies).

B

There may be exceptional individuals who mature more quickly than their peers, and who might be considered fully responsible for their actions prior to the age of 18, despite their lack of the experience upon which judgment depends.[11] In my view, however, it is not sufficient to accommodate the

[11] Delinquent juveniles are unlikely to be among these few. Instead, they will typically be among those persons for whom society's presumption of a capacity for mature judgment at 18 is much too generous. See, *e. g.*, Scharf, Law and the Child's Evolving Legal Conscience, in 1 Advances in Law and Child Development 1, 16 (R. Sprague ed. 1982) (discussing study of delinquents aged 15 to 17, suggesting that the group's mean moral maturity level was below that of average middle-class 10- to 12-year-olds).

facts about juveniles that an individual youth's culpability may be taken into account in the decision to transfer him or her from the juvenile to the adult court system for trial, or that a capital sentencing jury is instructed to consider youth and other mitigating factors. I believe that the Eighth Amendment requires that a person who lacks that full degree of responsibility for his or her actions associated with adulthood not be sentenced to death. Hence it is constitutionally inadequate that a juvenile offender's level of responsibility be taken into account only along with a host of other factors that the court or jury may decide outweigh that want of responsibility.

Immaturity that constitutionally should operate as a bar to a disproportionate death sentence does *not* guarantee that a minor will not be transferred for trial to the adult court system. Rather, the most important considerations in the decision to transfer a juvenile offender are the seriousness of the offense, the extent of prior delinquency, and the response to prior treatment within the juvenile justice system. National Institute for Juvenile Justice and Delinquency, United States Dept. of Justice, Major Issues in Juvenile Justice Information and Training, Youth in Adult Courts: Between Two Worlds 211 (1982). Psychological, intellectual, and other personal characteristics of juvenile offenders receive little attention at the transfer stage, and cannot account for differences between those transferred and those who remain in the juvenile court system. See Solway, Hays, Schreiner, & Cansler, Clinical Study of Youths Petitioned for Certification as Adults, 46 Psychological Rep. 1067 (1980). Nor is an adolescent's lack of full culpability isolated at the sentencing stage as a factor that determinatively bars a death sentence. A jury is free to weigh a juvenile offender's youth and lack of full responsibility against the heinousness of the crime and other aggravating factors—and, finding the aggravating factors weightier, to sentence even the most immature of 16- or 17-year olds to be killed. By no stretch of the imagination,

then, are the transfer and sentencing decisions designed to isolate those juvenile offenders who are exceptionally mature and responsible, and who thus stand out from their peers as a class.

It is thus unsurprising that individualized consideration at transfer and sentencing has not in fact ensured that juvenile offenders lacking an adult's culpability are not sentenced to die. Quite the contrary. Adolescents on death row appear typically to have a battery of psychological, emotional, and other problems going to their likely capacity for judgment and level of blameworthiness. A recent diagnostic evaluation of all 14 juveniles on death rows in four States is instructive. Lewis et al., Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, 145 Am. J. Psychiatry 584 (1988). Seven of the adolescents sentenced to die were psychotic when evaluated, or had been so diagnosed in earlier childhood; four others had histories consistent with diagnoses of severe mood disorders; and the remaining three experienced periodic paranoid episodes, during which they would assault perceived enemies. *Id.*, at 585, and Table 3. Eight had suffered severe head injuries during childhood, *id.*, at 585, and Table 1, and nine suffered from neurological abnormalities, *id.*, at 585, and Table 2. Psychoeducational testing showed that only 2 of these death-row inmates had IQ scores above 90 (that is, in the normal range)—and both individuals suffered from psychiatric disorders—while 10 offenders showed impaired abstract reasoning on at least some tests. *Id.*, at 585–586, and Tables 3 and 4. All but two of the adolescents had been physically abused, and five sexually abused. *Id.*, at 586–587, and Table 5. Within the families of these children, violence, alcoholism, drug abuse, and psychiatric disorders were commonplace. *Id.*, at 587, and Table 5.

The cases under consideration today certainly do not suggest that individualized consideration at transfer and sen-

tencing ensure that only exceptionally mature juveniles, as blameworthy for their crimes as an adult, are sentenced to death. Transferring jurisdiction over Kevin Stanford to Circuit Court, the Juvenile Division of the Jefferson, Kentucky, District Court nevertheless found that Stanford, who was 17 at the time of his crime,

> "has a low internalization of the values and morals of society and lacks social skills. That he does possess an institutionalized personality and has, in effect, because of his chaotic family life and lack of treatment, become socialized in delinquent behavior. That he is emotionally immature and could be amenable to treatment if properly done on a long term basis of psychotherap[eu]tic intervention and reality based therapy for socialization and drug therapy in a residential facility." App. in No. 87–5765, p. 9.

At the penalty phase of Stanford's trial, witnesses testified that Stanford, who lived with various relatives, had used drugs from the age of about 13, and that his drug use had caused changes in his personality and behavior. 10 Record in No. 87–5765, pp. 1383–1392, 1432. Stanford had been placed at times in juvenile treatment facilities, and a witness who had assessed him upon his admission to an employment skills project found that he lacked age-appropriate social interaction skills; had a history of drug abuse; and wanted for family support or supervision. *Id.*, at 1408; see also *id.*, at 1440–1442.

Heath Wilkins was 16 when he committed the crime for which Missouri intends to kill him. The juvenile court, in ordering him transferred for trial to adult court, focused upon the viciousness of Wilkins' crime, the juvenile system's inability to rehabilitate him in the 17 months of juvenile confinement available, and the need to protect the public, though it also mentioned that Wilkins was, in its view, "an experienced person, and mature in his appearance and habits." App. in No. 87–6026, p. 5. The Circuit Court found Wilkins

competent to stand trial.[12] Record in No. 87–6026, p. 42. Wilkins then waived counsel, with the avowed intention of pleading guilty and seeking the death penalty, *id.*, at 42, 55, and the Circuit Court accepted the waiver, *id.*, at 84, and later Wilkins' guilty plea, *id.*, at 144–145. Wilkins was not represented by counsel at sentencing. See *id.*, at 188–190. Presenting no mitigating evidence, he told the court he would prefer the death penalty to life in prison, *id.*, at 186–187—"[o]ne I fear, the other one I don't," *id.*, at 295—and after hearing evidence from the State, the Court sentenced Wilkins to die. Wilkins took no steps to appeal and objected to an *amicus'* efforts on his behalf. The Missouri Supreme Court, however, ordered an evaluation to determine whether Wilkins was competent to waive his right to appellate counsel. Concluding that Wilkins was incompetent to waive his rights,[13] the state-appointed forensic psychiatrist found that

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[12] Two psychological reports were prepared concerning Wilkins when the issue of his competency to stand trial arose. Neither suggests that Wilkins was exceptionally mature for his age. One found his intellectual functioning "within the average range," App. in No. 87–6026, p. 10, and his "[h]igher order processes," such as reasoning and judgment, to be "within the approximate normal range," *id.*, at 11. The other concluded:

"[Wilkins'] capacity to manage and control affect is tenuous and inconsistent, leaving him a subject to impulsive actions as well as arbitrary and capricious thinking which is prone to skirt over details, and considerations for logical systematic thought. He is intolerant of intense affects such as anxiety, depression, or anger, in that such feelings are overwhelming, interfere with his ability to think clearly, and gives rise to impulsive action. He is vulnerable to massive infusions of intense rage which leads to spasms of destructive action. His rage co-mingles with a profound depressive experience generated by an excruciating sense of lonely alienation whereby he experiences both himself and other people as being lifeless and empty. . . .

"He barely experiences ties to others or emp[athe]tic attunement . . . ." *Id.*, at 22.

[13] Wilkins was diagnosed as being of a "Conduct Disorder, Undersocialized-Aggressive Type," with a borderline personality disorder that left him with "difficulty in establishing a pattern of predictable response to stressful situations vacillating between aggression towards others or self-

Wilkins "suffers from a mental disorder" that affects his "reasoning and impairs his behavior." App. in No. 87–6026, p. 74. It would be incredible to suppose, given this psychiatrist's conclusion and his summary of Wilkins' past, set out in the margin,[14] that Missouri's transfer and sentencing schemes

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destructive activity." *Id.*, at 67–68. He had been "exhibiting bizarre behavior, paranoid ideation, and idiosyncratic thinking" since 1982. *Id.*, at 68.

[14] The state-appointed psychiatrist summarized Wilkins' past in his report:

"Mr. Wilkins . . . was raised in a rather poor socioeconomic environment [and] reportedly had extremely chaotic upbringing during his childhood. He was physically abused by his mother, sometimes the beatings would last for two hours. . . . As a child, he started robbing houses for knives and money and loved to set fires. Mr. Wilkins' mother worked at night and slept during the day, thus the children were left alone at night by themselves. He claims that he was started on drugs by his uncle [at age six; see *id.*, at 67]. Apparently he used to shoot BB guns at passing cars. Mr. Wilkins indicated that his mother's boyfriend had a quick temper and that he hated him. He also started disliking his mother, not only because she punished [him], but also because she stood up for her boyfriend who was unkind towards [him]. He then decided to poison his mother and boyfriend by placing rat poison in Tylenol capsules. They were informed by his brother about the situation. They secretly emptied the capsules and made him eat them. He was afraid of death and attempted vomiting by placing [his] fingers in his throat. Then he ended up getting a beating from his mother and boyfriend. At the age of ten, Mr. Wilkins was evaluated at Tri-County Mental Health Center and Western Missouri Mental Health Center. He stayed there for a period of six months. He was then sent to Butterfield Youth's Home and then to East Range, a residential facility for boys. He started using drugs quite heavily. . . . He also started drinking hard liquor . . . .

"At Butterfield, he was very angry at the teachers because they considered him to be 'dumb.' He showed rather strange behavior there. When he became depressed he would dance with a net over his head. On another occasion he cut his wrist and claimed to have had frequent thoughts of suicide. Prior to going to Butterfield, he had jumped off a bridge but the car swerved before he was hit. At Butterfield, he attempted to overdose with alcohol and drugs and another time with antipsychotic medication, Mellaril. Mr. Wilkins was placed on Mellaril because he was 'too active.' He stayed at . . . Butterfield . . . for three and one half years

had operated to identify in Wilkins a 16-year old mature and culpable beyond his years.

C

Juveniles very generally lack that degree of blameworthiness that is, in my view, a constitutional prerequisite for the

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between the ages of 10 through 13½. After that, he was transferred to Crittenton Center since it was closer to his mother's residence. He stayed there only for four or five months and was then kicked out. The court gave him permission to go home on probation. At this time his mother had started seeing another boyfriend and Mr. Wilkins apparently liked him. He continued the usage of alcohol and drugs while at school, continued to break into houses stealing money, jewelry, and knives, and generally stole money to spend at the arcade. On one occasion he ran away to Southern California. He was introduced to amphetamines there and spent all his money. . . . After his return [home, he] was charged with a stolen knife and was sent to [a] Detention Center . . . . At age 15, he was sent to the Northwest Regional Youth Services in Kansas City. There, an attempt at prescribing Thorazine (major tranquilizer) was made. After this, Mr. Wilkins was placed in a foster home. He ran away from the foster home . . . . Beginning in May of 1985 he lived on the streets . . . .

. . . . . .

"Records from Butterfield . . . indicated that Mr. Wilkins' natural father was committed to a mental institution in Arkansas, and there was considerable amount of physical abuse that existed in the family. . . . In the educational testing, he gave rather unusual responses. For example, when asked the reasons why we need policemen, he replied, 'To get rid of people like me.' He also revealed plans to blow up a large building in Kansas City [and] made bizarre derogatory sexual comments towards women prior to visits with his mother. He had episodes of hyperventilation and passed out by fainting or chest squeezing. . . . On one occasion in September of 1981, he put gasoline into a toilet and set fire to it, causing an explosion. Mr. Wilkins' brother was diagnosed to be suffering from schizophrenia when he was admitted along with Mr. Wilkins in 1982 at Crittenton Center. Mr. Wilkins was often noticed to be fantasizing about outer space and supernatural powers. In the fall of 1982, [the Crittenton psychiatrist] recommended placement on Mellaril because of a 'disoriented thinking pattern and high anxiety.' In 1983, his condition started deteriorating. . . . His final diagnoses in November of 1983 when he was discharged from Crittenton were Borderline Personality and Passive-Aggressive Personality. Psychological testing at Crittenton indicated isolated episodes of paranoid functioning." *Id.*, at 57–61.

imposition of capital punishment under our precedents concerning the Eighth Amendment proportionality principle. The individualized consideration of an offender's youth and culpability at the transfer stage and at sentencing has not operated to ensure that the only offenders under 18 singled out for the ultimate penalty are exceptional individuals whose level of responsibility is more developed than that of their peers. In that circumstance, I believe that the same categorical assumption that juveniles as a class are insufficiently mature to be regarded as fully responsible that we make in so many other areas is appropriately made in determining whether minors may be subjected to the death penalty. As we noted in *Thompson*, 487 U. S., at 825–826, n. 23, it would be ironic if the assumptions we so readily make about minors as a class were suddenly unavailable in conducting proportionality analysis. I would hold that the Eighth Amendment prohibits the execution of any person for a crime committed below the age of 18.

IV

Under a second strand of Eighth Amendment inquiry into whether a particular sentence is excessive and hence unconstitutional, we ask whether the sentence makes a measurable contribution to acceptable goals of punishment. *Thompson*, *supra*, at 833; *Enmund* v. *Florida*, 458 U. S., at 798; *Coker* v. *Georgia*, 433 U. S., at 592; *Gregg* v. *Georgia*, 428 U. S., at 173. The two "principal social purposes" of capital punishment are said to be "retribution and the deterrence of capital crimes by prospective offenders." *Gregg*, *supra*, at 183; see *Enmund*, 458 U. S., at 798. Unless the death penalty applied to persons for offenses committed under 18 measurably contributes to one of these goals, the Eighth Amendment prohibits it. See *ibid.*

"[R]etribution as a justification for executing [offenders] very much depends on the degree of [their] culpability." *Id.*, at 800. I have explained in Part III, *supra*, why I believe juveniles lack the culpability that makes a crime so ex-

treme that it may warrant, according to this Court's cases, the death penalty; and why we should treat juveniles as a class as exempt from the ultimate penalty. These same considerations persuade me that executing juveniles "does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." *Id.*, at 801. See *Thompson*, *supra*, at 836–837. A punishment that fails the Eighth Amendment test of proportionality because disproportionate to the offender's blameworthiness by definition is not justly deserved.

Nor does the execution of juvenile offenders measurably contribute to the goal of deterrence. Excluding juveniles from the class of persons eligible to receive the death penalty will have little effect on any deterrent value capital punishment may have for potential offenders who are over 18: these adult offenders may of course remain eligible for a death sentence. The potential deterrent effect of juvenile executions on adolescent offenders is also insignificant. The deterrent value of capital punishment rests "on the assumption that we are rational beings who always think before we act, and then base our actions on a careful calculation of the gains and losses involved." Gardiner, The Purposes of Criminal Punishment, 21 Mod. L. Rev. 117, 122 (1958). As the plurality noted in *Thompson*, *supra*, at 837, "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." First, juveniles "have less capacity . . . to think in long-range terms than adults," Task Force 7, and their careful weighing of a distant, uncertain, and indeed highly unlikely consequence prior to action is most improbable.[15] In addition, juveniles have little

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[15] See, *e. g.*, Kastenbaum, Time and Death in Adolescence, in The Meaning of Death 99, 104 (H. Feifel ed. 1959). Among the conclusions Kastenbaum drew from his study were that "[t]he adolescent lives in an intense present; 'now' is so real to him that both past and future seem pallid by

fear of death, because they have "a profound conviction of their own omnipotence and immortality." Miller, Adolescent Suicide: Etiology and Treatment, in 9 Adolescent Psychiatry 327, 329 (S. Feinstein, J. Looney, A. Schwartzberg, & A. Sorosky eds. 1981). See also, *e. g.*, Gordon, The Tattered Cloak of Immortality, in Adolescence and Death 16, 27 (C. Corr & J. McNeil eds. 1986) (noting prevalence of adolescent risk taking); Brief for American Society for Adolescent Psychiatry et al. as *Amici Curiae* 5–6 (citing research). Because imposition of the death penalty on persons for offenses committed under the age of 18 makes no measurable contribution to the goals of either retribution or deterrence, it is "nothing more than the purposeless and needless imposition of pain and suffering," *Coker*, *supra*, at 592, and is thus excessive and unconstitutional.

V

There are strong indications that the execution of juvenile offenders violates contemporary standards of decency: a majority of States decline to permit juveniles to be sentenced to death; imposition of the sentence upon minors is very unusual even in those States that permit it; and respected organizations with expertise in relevant areas regard the execution of juveniles as unacceptable, as does international opinion. These indicators serve to confirm in my view my conclusion that the Eighth Amendment prohibits the execution of persons for offenses they committed while below the age of 18, because the death penalty is disproportionate when applied to such young offenders and fails measurably to serve the goals of capital punishment. I dissent.

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comparison. Everything that is important and valuable in life lies either in the immediate life situation or in the rather close future." *Ibid.*

WYOMING *v.* UNITED STATES ET AL.

CERTIORARI TO THE SUPREME COURT OF WYOMING

No. 88–309. Argued April 25, 1989—Decided June 26, 1989

753 P. 2d 76, affirmed by an equally divided Court.

Michael Douglas White argued the cause for petitioner. With him on the briefs were *Joseph B. Meyer*, Attorney General of Wyoming, *S. Jane Caton*, Assistant Attorney General, and *David F. Jankowski*.

Jeffrey P. Minear argued the cause for the United States. With him on the brief were *Acting Solicitor General Bryson*, *Acting Assistant Attorney General Carr*, *Deputy Solicitor General Wallace*, *Edward J. Shawaker*, and *Robert L. Klarquist*. *Susan M. Williams* argued the cause for respondents Shoshone Tribe et al. With her on the brief were *Brice M. Clagett*, *Saul B. Goodman*, *W. Richard West, Jr.*, *Dale T. White*, and *Andrew W. Baldwin*. *Sky D. Phifer* filed a brief for respondents Bath et al.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Jim Jones*, Attorney General of Idaho, and *Clive J. Strong* and *David J. Barber*, Deputy Attorneys General, *Robert K. Corbin*, Attorney General of Arizona, *Marc Racicot*, Attorney General of Montana, *Brian McKay*, Attorney General of Nevada, *R. Paul Van Dam*, Attorney General of Utah, and *Kenneth O. Eikenberry*, Attorney General of Washington; and for the city of Phoenix by *Roderick G. McDougall*, *M. James Callahan*, and *Katherine Ott Verburg*.

Harry R. Sachse, *Reid Peyton Chambers*, *Ethel J. Abeita*, and *Robert T. Anderson* filed a brief for the Native American Rights Fund et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *R. H. Connett*, Assistant Attorney General, *Douglas B. Noble*, Deputy Attorney General, *Fred Vendig*, *Karen L. Tachiki*, and *Jerome C. Muys;* for the State of New Mexico by *Hal Stratton*, Attorney General, and *Martha C. Dabney* and *Vickie L. Gabin*, Special Assistant Attorneys General; for the County of Chaves et al. by *Gary C. Mitchell* and *Richard A. Simms;* for the Salt

PER CURIAM.

The judgment below is affirmed by an equally divided Court.

JUSTICE O'CONNOR took no part in the decision of this case.

River Project Agricultural Improvement and Power District by *John B. Weldon, Jr.*, and *Stephen E. Crofton;* for the village of Ruidoso by *Neil C. Stillinger* and *Kathleen R. Marr;* and for the Shoshone-Bannock Tribes by *Jeanette Wolfley.*

BRENDALE *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87–1622. Argued January 10, 1989—Decided June 29, 1989*

The treaty between the United States and the Yakima Indian Nation (Yakima Nation or Tribe) provided that the Tribe would retain its reservation for its "exclusive use and benefit," and that "no white man [shall] be permitted to reside upon the said reservation without [the Tribe's] permission." Much of the reservation is located in Yakima County, Washington. Roughly 80% of the reservation land is held in trust by the United States for the Tribe or its individual members, and the remaining 20% is owned in fee by Indian or non-Indian owners. Most of the fee land is found in three towns, and the rest is scattered throughout the reservation in a "checkerboard" pattern. The reservation is divided into two parts: a "closed area," which is so named because it has been closed to the general public, and an "open area," which is not so restricted. Only a small portion of the closed area consists of fee land, while almost half of the open area is fee land. The Tribe's zoning ordinance applies to all lands within the reservation, including fee lands owned by Indians or non-Indians, while the county's zoning ordinance applies to all lands within its boundaries, except for Indian trust lands. Petitioners Brendale and Wilkinson (hereinafter petitioners), who own land in the closed and open areas respectively, filed applications with the Yakima County Planning Department to develop their lands in ways not permitted by the Tribe's ordinance but permitted by the county ordinance. The department issued declarations to both petitioners which, in effect, authorized their developments, and the Tribe appealed the declarations to the county board of commissioners on the ground, *inter alia*, that the county had no zoning authority over the land in question. After the board concluded that the appeals were properly before it and issued decisions, the Tribe filed separate actions in District Court challenging the proposed developments and seeking declaratory judgments that the Tribe had ex-

*Together with No. 87–1697, *Wilkinson* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, and No. 87–1711, *County of Yakima et al.* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, also on certiorari to the same court.

clusive authority to zone the properties at issue and injunctions barring any county action inconsistent with the Tribe's ordinance. The court held that the Tribe had exclusive jurisdiction over the Brendale property but lacked authority over the Wilkinson property, concluding that Brendale's proposed development, but not Wilkinson's, posed a threat to the Tribe's political integrity, economic security, and health and welfare, and therefore was impermissible under *Montana* v. *United States*, 450 U. S. 544. The court also determined that the county was pre-empted from exercising concurrent zoning authority over closed area lands because its interests in regulating those lands were minimal while the Tribe's were substantial. The Court of Appeals consolidated the cases and affirmed as to the Brendale property but reversed as to the Wilkinson property. In upholding the Tribe's zoning authority, the court concluded that, because fee land is located throughout the reservation in a checkerboard pattern, denying the Tribe its right under its local governmental police power to zone fee land would destroy its capacity to engage in comprehensive planning.

Held: The judgment is affirmed in part and reversed in part.

828 F. 2d 529: No. 87–1622, affirmed; Nos. 87–1697 and 87–1711, reversed.

JUSTICE WHITE, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY, announced the judgment of the Court in Nos. 87–1697 and 87–1711, concluding that:

1. The Tribe does not have authority to zone fee lands owned by nonmembers within the reservation. Pp. 421–433.

(a) Any regulatory power the Tribe might have under its treaty with the United States cannot apply to lands held in fee by non-Indians. *Montana*, 450 U. S., at 559. The Tribe no longer retains the "exclusive use and benefit" of such lands within the meaning of the treaty, since the Indian General Allotment Act allotted significant portions of the reservation, including the lands at issue, to individual members of the Tribe, and those lands subsequently passed, through sale or inheritance, to nonmembers such as petitioners. The Tribe's treaty rights must be read in light of those subsequent alienations, it being unlikely that Congress intended to subject non-Indian purchasers to tribal jurisdiction when an avowed purpose of the allotment policy was to destroy tribal government. *Id.*, at 560, n. 9, 561. The fact that the Allotment Act was repudiated in 1934 by the Indian Reorganization Act is irrelevant, since the latter Act did not restore exclusive use of the lands in question to the Tribe. *Id.*, at 560, n. 9. Pp. 422–425.

(b) Nor does the Tribe derive authority from its inherent sovereignty to impose its zoning ordinance on petitioners' lands. Such sovereignty generally extends only to what is necessary to protect tribal self-

government or to control internal relations, and is divested to the extent it is inconsistent with a tribe's dependent status—*i. e.*, to the extent it involves the tribe's external relations with nonmembers—unless there has been an express congressional delegation of tribal power to the contrary. *Montana*, *supra*, at 564. *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 153; and *United States* v. *Wheeler*, 435 U. S. 313, 326, reconciled. There is no contention here that Congress has expressly delegated to the Tribe the power to zone the fee lands of nonmembers. Pp. 425–428.

(c) Although *Montana*, *supra*, at 566, recognized, as an exception to its general principle, that a tribe "may" retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the tribe's political integrity, economic security, or health and welfare, that exception does not create tribal authority to zone reservation lands. The fact that the exception is prefaced by the word "may" indicates that a tribe's authority need not extend to all conduct having the specified effects, but, instead, depends on the circumstances. A literal application of the exception would make little sense in the present circumstances. To hold that the Tribe has authority to zone fee land when the activity on that land has the specified effects on Indian properties would mean that the authority would last only so long as the threatened use continued, would revert to the county when that use ceased, and, conceivably, could switch back and forth depending on what uses the county permitted, thereby engendering uncertainty that would further neither the Tribe's nor the county's interests and would be chaotic for landowners. Accordingly, *Montana* should be understood to generally prohibit tribes from regulating the use of fee lands by way of tribal ordinance or actions in the tribal courts, but to recognize, in the special circumstances of checkerboard ownership of reservation lands, a protectible tribal interest under federal law, defined in terms of a demonstrably serious impact by the challenged uses that imperils tribal political integrity, economic security, or health and welfare. Since the Supremacy Clause requires state and local governments, including the county's zoning authorities, to recognize and respect that interest in the course of their activities, the Tribe should have argued in the zoning proceedings, not that the county was without zoning authority over reservation fee land, but that its tribal interests were imperiled. The District Court had jurisdiction to entertain the Tribe's suit, but, given that the county has jurisdiction to zone reservation fee lands, could enjoin county action only if the county failed to respect the Tribe's federal-law rights. Pp. 428–432.

2. In light of the District Court's findings that the county's exercise of zoning power over the Wilkinson property would have no direct effect on

the Tribe and would not threaten its political integrity, economic security, or health and welfare, the judgment in No. 87–1697 and 87–1711 must be reversed. Pp. 432–433.

JUSTICE STEVENS, joined by JUSTICE O'CONNOR, announced the judgment of the Court in No. 87–1622 and concurred in the judgment in Nos. 87–1697 and 87–1711, concluding that:

1. The Tribe's power to exclude nonmembers from its reservation—which derived from its aboriginal sovereignty and the express provisions of its treaty with the United States—necessarily includes the lesser power to regulate land use in the interest of protecting the tribal community. Although, at one time, the Tribe's power to exclude was virtually absolute, the General Allotment Act (Dawes Act) in some respects diminished tribal authority by providing for the allotment of reservation lands in severalty to resident Indians, who were eventually free to sell to nonmembers. While the Indian Reorganization Act repudiated that allotment policy, large portions of reservation lands were conveyed to nonmembers in the interim. To the extent that large portions of reservation land were sold in fee, such that the Tribe could no longer determine the region's essential character by setting conditions on entry to those parcels, the Tribe's legitimate interest in land-use regulation was also diminished. Although it is inconceivable that Congress would have intended that the sale of a few lots would divest the Tribe of the power to determine the character of the region, it is equally improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers who lack any voice in setting tribal policy. Thus, the resolution of these cases depends on the extent to which the Tribe's virtually absolute power to exclude has been either diminished by statute or voluntarily surrendered by the Tribe itself with respect to the relevant areas of the reservation. Pp. 433–437.

2. The Tribe has the power to zone the Brendale property, which is in the reservation's closed area. Although the presence of logging operations, the construction of Bureau of Indian Affairs roads, and the transfer of ownership of a relatively insignificant amount of land in that area unquestionably have diminished the Tribe's power to exclude non-Indians from the area, this does not justify the conclusion that the Tribe has surrendered its historic right to regulate land use there. To the contrary, by maintaining the power to exclude nonmembers from entering all but a small portion of that area, the Tribe has preserved the power to define the area's essential character and has, in fact, exercised that power through its zoning ordinance. Moreover, the Tribe has authority to prevent the few individuals who own portions of the closed area in fee from undermining its general plan to preserve the area's

unique character by developing their isolated parcels without regard to an otherwise common scheme. It seems necessary to a reasonable operation of the allotment process that Congress could not possibly have intended in enacting the Dawes Act that tribes would lose control over the character of their reservations upon the sale of a few, relatively small parcels of lands. Cf. *Seymour* v. *Superintendent of Washington State Penitentiary*, 368 U. S. 351, 356; *Mattz* v. *Arnett*, 412 U. S. 481, 497. Rather, the tribes' power to zone is like an equitable servitude in that the burden of complying with the zoning rules runs with the land without regard to how a particular estate is transferred. *Montana* v. *United States*, 450 U. S. 544, does not require a different result, since, unlike the tribal regulation considered in that case, the Yakima Nation's zoning rule is neutrally applied to Indians and non-Indians alike, is necessary to protect the welfare of the Tribe, and does not interfere with any significant state or county interest. Pp. 438–444.

3. The Tribe lacks authority to zone the Wilkinson property, which is in the reservation's open area. Given that about half of the open area land is owned by nonmembers, the Tribe no longer possesses the power to determine the basic character of that area, and allowing a nonmember to use his lands in a manner that might not be approved by the Tribe does not upset an otherwise coherent scheme of land use. Moreover, it is unlikely that Congress intended to give the Tribe the power to determine the character of an area that is predominately owned and populated by nonmembers, who represent 80% of the population yet lack a voice in tribal governance. Furthermore, to the extent the open area has lost its character as an exclusive tribal resource, and has become, as a practical matter, an integrated portion of the county that is not economically or culturally delimited by reservation boundaries, the Tribe has lost any claim to an interest analogous to an equitable servitude. Thus, the Tribe's power to zone the open area has become outmoded. Pp. 444–447.

JUSTICE BLACKMUN, joined by JUSTICE BRENNAN and JUSTICE MARSHALL, concurred in the judgment in No. 87–1622, concluding that an Indian tribe's power to zone reservation lands, once it chooses to exercise that power, is exclusive. Thus, the county lacks authority to zone the Yakima Nation's reservation lands, including fee lands, in both the open and closed areas. Pp. 448–468.

(a) Under all of the Court's decisions dealing with the inherent sovereignty of Indian tribes, including *Montana* v. *United States*, 456 U. S. 544, tribes retain the inherent authority to exercise civil jurisdiction over non-Indian activities on reservation lands, including the power to zone fee lands, where those non-Indian activities implicate significant tribal interests. Moreover, this Court's decisions and common sense

compel a finding that a tribe has zoning authority over all the lands within its reservation and not just those in "closed" areas. Pp. 449–465.

(b) Although the States have concurrent authority to exercise jurisdiction over non-Indian activities on reservation lands in some circumstances, this authority is pre-empted if its exercise would do violence to the right of either sovereign. Concurrent zoning jurisdiction by its very nature is unworkable, since it has the practical effect of nullifying the efforts of both sovereigns to establish comprehensive plans in every instance where the two establish different permissible land uses for the same tract. Pp. 465–468.

WHITE, J., joined by REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., delivered an opinion announcing the judgment of the Court in Nos. 87–1697 and 87–1711 and dissenting in No. 87–1622. STEVENS, J., joined by O'CONNOR, J., delivered an opinion announcing the judgment of the Court in No. 87–1622 and concurring in the judgment in Nos. 87–1697 and 87–1711, *post*, p. 433. BLACKMUN, J., joined by BRENNAN and MARSHALL, JJ., filed an opinion concurring in the judgment in No. 87–1622 and dissenting in Nos. 87–1697 and 87–1711, *post*, p. 448.

Jeffrey C. Sullivan argued the cause for petitioners in all cases. With him on the briefs for petitioners in No. 87–1711 was *Terry Austin*. *Charles C. Flower* and *Patrick Andreotti* filed briefs for petitioner in No. 87–1622. *Dale B. Ramerman*, *Ronald T. Schaps*, and *Michael Mirande* filed briefs for petitioner in No. 87–1697.

Tim Weaver argued the cause for respondents in all cases. With him on the brief was *R. Wayne Bjur*.†

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†Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Kenneth O. Eikenberry*, Attorney General of Washington, and *Timothy R. Malone*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Robert K. Corbin* of Arizona, *Jim Jones* of Idaho, *Frank J. Kelley* of Michigan, *Michael T. Greely* of Montana, *Brian McKay* of Nevada, *Hal Stratton* of New Mexico, *Nicholas J. Spaeth* of North Dakota, *David L. Wilkinson* of Utah, and *Joseph B. Meyer* of Wyoming; for the State of South Dakota by *Roger A. Tellinghuisen*, Attorney General, and *John P. Guhin*, Deputy Attorney General; for Mendocino County et al. by *Tom D. Tobin;* for the city of Green Bay, Wisconsin, et al. by *James L. Quarles III*, *William F. Lee*, and *Kathryn Bucher;* for the town of Parker, Arizona, by *John B. Weldon, Jr.*, *Stephen E. Crofton* and *Gerald W. Hunt;* for the Citizens Equal Rights Alliance, Inc., et al. by *Kenn A. Pugh;* for the National Association of Counties et

JUSTICE WHITE, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY, delivered an opinion announcing the judgment of the Court in Nos. 87–1697 and 87–1711 and dissenting in No. 87–1622.

The issue presented by these three consolidated cases is whether the Yakima Indian Nation or the County of Yakima, a governmental unit of the State of Washington, has the authority to zone fee lands owned by nonmembers of the Tribe located within the boundaries of the Yakima Reservation.

I

A

The Confederated Bands and Tribes of the Yakima Indian Nation are composed of 14 originally distinct Indian Tribes that banded together in the mid-1800's to negotiate with the United States. The result of those negotiations was a treaty signed in 1855 and ratified by the Senate in 1859. Treaty between the United States and the Yakima Nation of Indians (Treaty with the Yakimas), 12 Stat. 951. By the terms of the treaty, the Yakima Nation ceded vast areas of land to the

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al. by *Benna Ruth Solomon, Joyce Holmes Benjamin, Robert L. Deitz,* and *F. Henry Habicht II;* and for the Quinault Property Owners Association et al. by *Thomas M. Christ* and *Dennis D. Reynolds.*

Briefs of *amici curiae* urging affirmance were filed for the Colorado River Indian Tribes by *Alletta d'A. Belin* and *William G. Lavell;* for the Confederated Tribes of the Colville Reservation et al. by *Bruce E. Didesch, Allen H. Sanders,* and *Amy L. Crewdson;* for the National Congress of American Indians et al. by *Thomas E. Luebben* and *James A. Bowen;* for the Navajo Nation by *Steven J. Bloxham;* for the Governing Council of the Pinoleville Indian Community by *David J. Rapport;* for the Three Affiliated Tribes of the Fort Berthold Reservation by *Charles A. Hobbs;* for the Standing Rock Sioux Tribe et al. by *William R. Perry* and *Harry R. Sachse;* and for the Swinomish Tribal Community et al. by *Jeanette Wolfley, Thomas R. Acevedo, Jack F. Trope, Jeanne S. Whiteing, Dale T. White, Scott B. McElroy, W. Richard West, Jr.,* and *Daniel A. Raas.*

United States but retained an area, the Yakima Indian Reservation, for its "exclusive use and benefit." *Id.*, at 952.[1]

The reservation is located in the southeastern part of the State of Washington. Approximately 1.3 million acres of land are located within its boundaries. Of that land, roughly 80% is held in trust by the United States for the benefit of the Yakima Nation or individual members of the Tribe. The remaining 20% of the land is owned in fee by Indian or non-Indian owners. Most of the fee land is found in Toppenish, Wapato, and Harrah, the three incorporated towns located in the northeastern part of the reservation. The remaining fee land is scattered throughout the reservation in a "checkerboard" pattern.

The parties to this litigation, as well as the District Court and the Court of Appeals, have treated the Yakima Reservation as divided into two parts: a "closed area" and an "open area." The closed area consists of the western two-thirds of the reservation and is predominantly forest land. Of the approximately 807,000 acres of land in the closed area, 740,000 acres are located in Yakima County. Twenty-five thousand acres of the seven hundred and forty thousand acres are fee land. The closed area is so named because it has been closed to the general public at least since 1972 when the Bureau of Indian Affairs restricted the use of federally maintained roads in the area to members of the Yakima Nation and to its permittees, who must be record landowners or associated with the Tribe.[2] Access to the open area, as its name sug-

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[1] The treaty further provides that no "white man, excepting those in the employment of the Indian Department, [shall] be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent." 12 Stat. 951, 952.

[2] At oral argument, counsel arguing for petitioners represented that a decision by the Bureau of Indian Affairs in April 1988, after the Court of Appeals issued its opinion here, has reopened the roads in the closed area to the public. Tr. of Oral Arg. 17. See App. to Brief for Petitioner Brendale 1a. According to counsel, there is no longer a closed area on the reservation. Tr. of Oral Arg. 17. Counsel for respondents agreed with

gests, is not likewise restricted to the general public. The open area is primarily rangeland, agricultural land, and land used for residential and commercial development. Almost half of the land in the open area is fee land.

B

The Yakima Nation adopted its first zoning ordinance in 1970. The ordinance was amended to its present form in 1972. By its terms, the Yakima Nation ordinance applies to all lands within the reservation boundaries, including fee lands owned by Indians or non-Indians. Yakima County adopted its present comprehensive zoning ordinance in 1972, although the county had regulated land use as early as 1946. The county ordinance applies to all real property within county boundaries, except for Indian trust lands. The ordinance establishes a number of use districts, which generally govern agricultural, residential, commercial, industrial, and forest watershed uses. The particular zoning designations at issue are "forest watershed" and "general rural."

The fee lands located in the closed area are zoned by the county ordinance as forest watershed. That designation permits development of single-family dwellings, commercial campgrounds, small overnight lodging facilities, restaurants, bars, general stores and souvenir shops, service stations, marinas, and sawmills. The minimum lot size is one-half acre. None of these uses would be permitted by the zoning des-

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this characterization, describing what had formerly been the closed area as the "reservation reserved area," based on the Yakima Nation's zoning designation for the area. *Id.*, at 28. Despite these developments, JUSTICE STEVENS persists in treating the two areas differently, *post*, at 439–440, a position that is rejected by seven Members of the Court, see also, *post*, at 468, n. 10 (opinion of BLACKMUN, J.), and continues to rely on the District Court's findings of fact regarding the Brendale property, which are undermined by the change in circumstances. This opinion will continue to refer to the respective areas as the closed area and the open area, but for convenience only.

ignation "reservation restricted area," which applies to the closed area under the Yakima Nation zoning ordinance.

The general rural zoning designation, applicable to land in the open area, is one of three use districts governing agricultural properties. The minimum lot size for land zoned general rural is smaller than that specified for agricultural land in the Yakima Nation ordinance, although the other county use districts for agricultural properties have larger minimum lot sizes than the Yakima Nation ordinance.

C

1

Petitioner Philip Brendale, who is part Indian but not a member of the Yakima Nation, owns a 160-acre tract of land near the center of the forested portion of the closed area. The parcel was originally allotted to Brendale's great aunt, a member of the Yakima Nation. The land passed by inheritance to Brendale's mother and grandfather, who were issued a fee patent in 1963, and then, on his mother's death in 1972, to Brendale. The land is zoned as reservation restricted area by the Yakima Nation. It is zoned forest watershed by Yakima County.

In January 1982, Brendale filed four contiguous "short plat" applications with the Yakima County Planning Department. After determining that the short platting did not require an Environmental Impact Statement (EIS), the department issued a Declaration of Non-Significance. The department requested comments from the Yakima Nation, and after the Tribe did not respond, the short plats were approved.

Brendale then submitted in April 1983 a "long plat" application to divide one of his platted 20-acre parcels into 10 2-acre lots to be sold as summer cabin sites. Each lot is to have an individual well and a septic tank. Electric generators would provide electricity. The proposed plat is bordered on the north and east by other lands owned by Brendale, on the

south by lands owned in fee by the St. Regis Paper Company, and on the west by lands held in trust by the United States. The proposed development would not have been permissible under the Yakima Nation ordinance.

The county planning department again issued a Declaration of Non-Significance. The Yakima Nation appealed the Declaration of Non-Significance to the Yakima County Board of Commissioners on the grounds that the county had no zoning authority over the land and that an EIS was necessary. The commissioners concluded that the appeal was properly before the Board but reversed the planning department and ordered that an EIS be prepared.[3]

2

Petitioner Stanley Wilkinson, a non-Indian and a nonmember of the Yakima Nation, owns a 40-acre tract of land in the open area of the reservation. The tract is located less than a mile from the northern boundary of the reservation and is on a slope overlooking the Yakima Municipal Airport and the city of Yakima. The land is bordered on the north by trust land and on the other three sides by fee land, and is currently vacant sagebrush property. It is zoned agricultural by the Yakima Nation and general rural by Yakima County.

In September 1983, Wilkinson applied to the Yakima County Planning Department to subdivide 32 acres of his land into 20 lots. The lots range in size from 1.1 acres to 4.5 acres. Each is to be used for a single-family home and will be served by individual wells and septic systems. The proposed development would not have been permissible under the Yakima Nation ordinance.

The planning department initially indicated that an EIS needed to be prepared for the project, but later, after Wilkinson modified his proposal, the department issued a Declaration of Non-Significance. The Yakima Nation thereafter ap-

[3] Preparation of the EIS was underway when the Yakima Nation filed the present action in District Court.

pealed the Declaration of Non-Significance, again challenging the county's authority to zone the land and alleging that an EIS was necessary. The county board of commissioners concluded that the appeal was properly before it and affirmed the planning department's conclusion that an EIS was not necessary.

D

The Yakima Nation then filed separate actions in United States District Court challenging the proposed development of the Brendale and Wilkinson properties and the county's exercise of zoning authority over the land.[4] The complaints sought a declaratory judgment that the Yakima Nation had exclusive authority to zone the properties at issue and an injunction barring any action or the approval of any action on the land inconsistent with the land-use regulations of the Yakima Nation.

The District Court held that the Yakima Nation had exclusive zoning authority over the Brendale property, *Yakima Indian Nation* v. *Whiteside*, 617 F. Supp. 735, 744, 747 (ED Wash. 1985) *(Whiteside I)*, but concluded that the Tribe lacked authority over the Wilkinson property, *Yakima Indian Nation* v. *Whiteside*, 617 F. Supp. 750, 758 (ED Wash. 1985) *(Whiteside II)*. The District Court looked to this Court's opinion in *Montana* v. *United States*, 450 U. S. 544 (1981), as controlling whether an Indian tribe has authority to regulate activities of nonmembers of the tribe on fee lands. The District Court determined that there was no evidence of any "consensual relationship" between the Yakima Nation

[4] In addition to Brendale, Wilkinson, and Yakima County, the Yakima Nation named as defendants Jim Whiteside and two other County Commissioners of Yakima County, the Director of the Planning Department of Yakima County, the codeveloper of the Brendale property, and prospective purchasers of portions of the Wilkinson property. The developer and the prospective purchasers were dismissed as parties by order of the District Court. See *Yakima Indian Nation* v. *Whiteside*, 617 F. Supp. 735, 737, n. 1 (ED Wash. 1985) *(Whiteside I)*; *Yakima Indian Nation* v. *Whiteside*, 617 F. Supp. 750, 751, n. 1 (ED Wash. 1985) *(Whiteside II)*.

and Wilkinson and Brendale that would extend the authority of the Tribe to the fee lands. 617 F. Supp., at 743; 617 F. Supp., at 757. But after making detailed findings of fact,[5] the court concluded that "Brendale's proposed development does indeed pose a threat to the political integrity, the economic security and the health and welfare of the Yakima Nation," and therefore the Tribe has authority to impose its zoning regulations on that property. 617 F. Supp., at 744. The District Court then proceeded to determine that Yakima County was pre-empted from exercising concurrent zoning authority over the land in the closed area because its interests in regulating the land were minimal while the Tribe's interests were substantial. *Id.*, at 747. But because Wilkinson's proposed development did not impose a similar threat, the Tribe had no authority whatsoever over that property. 617 F. Supp., at 758.

On appeal, the Ninth Circuit consolidated the cases and affirmed as to the Brendale property but reversed as to the Wilkinson property. *Confederated Tribes and Bands of the Yakima Indian Nation* v. *Whiteside*, 828 F. 2d 529 (1987). In upholding the Yakima Nation's zoning authority, the Court of Appeals did not disturb or rely on the findings of the District Court. Instead, it concluded that zoning ordinances

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[5] The District Court found that Brendale's proposed development would disrupt soil conditions; cause a deterioration of air quality; change drainage patterns; destroy some trees and natural vegetation; cause a deterioration of wildlife habitat; alter the location and density of human population in the area; increase traffic, light, and the use of fuel wood; and require added police and fire protection as well as new systems for waste disposal. The court also found that a number of places of religious and cultural significance were located in the closed area and that much of the Tribe's income comes from lumber harvested from lands within the closed area. 617 F. Supp., at 741–742. Unlike the closed area, however, the District Court found that the open area had no unique religious or spiritual importance to the Yakima Nation and that the trust land in the vicinity of the proposed Wilkinson development did not provide a significant source of food for the Tribe. 617 F. Supp., at 755.

by their very nature attempt "to protect against the damage caused by uncontrolled development, which can affect all of the residents and land of the reservation." *Id.*, at 534. According to the Court of Appeals, zoning ordinances are within the police power of local governments precisely because they promote the health and welfare of the community. Moreover, a "major goal" of zoning is coordinated land-use planning. Because fee land is located throughout the reservation in a checkerboard pattern, denying the Yakima Nation the right to zone fee land "would destroy [its] capacity to engage in comprehensive planning, so fundamental to a zoning scheme." This the court was "unwilling" to do. *Id.*, at 534–535.[6]

Brendale, Wilkinson, and Yakima County each petitioned for writ of certiorari.[7] We granted the petitions and consolidated the cases for argument. 487 U. S. 1204 (1988).

II

The present actions were brought by the Yakima Nation to require development occurring on property within the boundaries of its reservation to proceed in accordance with the Yakima Nation zoning ordinance. The Tribe is necessarily contending that it has the exclusive authority to zone all of the property within the reservation, including the projects at issue here. We therefore examine whether the Yakima Nation has the authority, derived either from its treaty with the

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[6] The Court of Appeals then remanded to the District Court for findings of fact on the respective interests of the Yakima Nation and Yakima County in regulating the Wilkinson property, since the District Court had made such findings only concerning the Brendale property. *Confederated Tribes and Bands of the Yakima Indian Nation* v. *Whiteside*, 828 F. 2d 529, 536 (CA9 1987).

[7] Yakima County did not appeal the judgment of the District Court in *Whiteside I*, respecting the Brendale Property, App. 7, 11, and the only issue presented in its petition for certiorari concerned the Wilkinson property. Brendale and Wilkinson each petitioned for certiorari concerning their own property.

United States or from its status as an independent sovereign, to zone the fee lands owned by Brendale and Wilkinson.

A

The Yakima Nation argues first that its treaty with the United States establishes its authority to regulate fee land within the reservation but owned by nonmembers of the Tribe. By its terms, the Treaty with the Yakimas provides that the land retained by the Yakima Nation "shall be set apart . . . for the exclusive use and benefit" of the Tribe, and no "white man, excepting those in the employment of the Indian Department, [shall] be permitted to reside upon the said reservation without permission of the tribe." 12 Stat. 951, 952. The Yakima Nation contends that this power to exclude provides the source for its authority over the land at issue here.

We disagree. The Yakima Nation no longer retains the "exclusive use and benefit" of all the land within the reservation boundaries established by the Treaty with the Yakimas. Under the Indian General Allotment Act, 24 Stat. 388, significant portions of the Yakima Reservation, including the tracts of land at issue here, were allotted to individual members of the Tribe. The land was held in trust for a period of years, generally 25 although the period was subject to extension, after which fee patents were issued. *Id.*, at 389, § 5. Over time, through sale and inheritance, nonmembers of the Tribe, such as petitioners Brendale and Wilkinson, have come to own a substantial portion of the allotted land.

We analyzed the effect of the Allotment Act on an Indian tribe's treaty rights to regulate activities of nonmembers on fee land in *Montana* v. *United States*. The treaty language there was virtually identical to the language in the Treaty with the Yakimas, 450 U. S., at 558, and we concluded that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Id.*, at 561. See also *Puyallup Tribe, Inc.* v. *Washington Game*

Dept., 433 U. S. 165, 174 (1977). In *Montana*, as in the present cases, the lands at issue had been alienated under the Allotment Act, and the Court concluded that "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." 450 U. S., at 560, n. 9.

The Yakima Nation argues that we should not consider the Allotment Act because it was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984. But the Court in *Montana* was well aware of the change in Indian policy engendered by the Indian Reorganization Act and concluded that this fact was irrelevant. 450 U. S., at 560, n. 9. Although the Indian Reorganization Act may have ended the allotment of further lands, it did not restore to the Indians the exclusive use of those lands that had already passed to non-Indians or prevent already allotted lands for which fee patents were subsequently issued from thereafter passing to non-Indians.

JUSTICE STEVENS acknowledges that the Allotment Act eliminated tribal authority to exclude nonmembers from fee lands they owned. *Post*, at 436–437. Yet he concludes that Brendale and Wilkinson are somehow subject to a tribal power to "determine the character of the tribal community," *post*, at 437, unless the Tribe has voluntarily surrendered that power. This view of tribal zoning authority as a sort of equitable servitude, *post*, at 442, is wholly unsupported by precedent.

JUSTICE STEVENS begins with a tribe's power to exclude nonmembers from its land and from that power derives a tribal "power to define the character of" that land, *post*, at 434, which he asserts as the basis for the Yakima Nation's exercise of zoning authority over the closed area of its reservation. According to JUSTICE STEVENS, the power to exclude "necessarily must include the lesser power to regulate land

use in the interest of protecting the tribal community." *Post*, at 433. But the Yakima Nation no longer has the power to exclude fee owners from its land within the boundaries of the reservation, as JUSTICE STEVENS concedes. *Post*, at 437. Therefore, that power can no longer serve as the basis for tribal exercise of the lesser included power, a result which is surely not "inconceivable," *post*, at 437, but rather which is perfectly straightforward. It is irrelevant that the Tribe had declared the closed area off limits before Brendale obtained title to his property. Once Brendale obtained title to his land that land was no longer off limits to him; the tribal authority to exclude was necessarily overcome by, as JUSTICE STEVENS puts it, an "implici[t] grant" of access to the land. *Ibid.*

Aside from the alleged inconceivability of the result, JUSTICE STEVENS offers no support for his assertion that in enacting the Allotment Act Congress intended tribes to retain the "power to determine the character of the tribal community." *Ibid.* JUSTICE STEVENS cites only *Seymour* v. *Superintendent of Washington State Penitentiary*, 368 U. S. 351 (1962), and *Mattz* v. *Arnett*, 412 U. S. 481 (1973), in support of his position. *Post*, at 441–442. Those cases are irrelevant to the issue at hand, however, concluding merely that allotment is consistent with continued reservation status. Meanwhile, *Montana* is directly to the contrary: the Court there flatly rejected the existence of a power, derived from the power to exclude, to regulate activities on lands from which tribes can no longer exclude nonmembers. See 450 U. S., at 559. JUSTICE STEVENS' attempts to distinguish *Montana* are unavailing. The distinctions on which he relies, that the regulation there was discriminatory, posed no threat to the welfare of the Tribe, and infringed on state interests, *post*, at 443–444, are not even mentioned in the section of the *Montana* opinion considering the power to exclude, see 450

U. S., at 557–563, and certainly were not considered by the Court in that case as having any relevance to this issue.[8]

We would follow *Montana* and conclude that, for the reasons stated there, any regulatory power the Tribe might have under the treaty "cannot apply to lands held in fee by non-Indians." *Id.*, at 559.

B

An Indian tribe's treaty power to exclude nonmembers of the tribe from its lands is not the only source of Indian regulatory authority. In *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 141 (1982), the Court held that tribes have inherent sovereignty independent of that authority arising from their power to exclude. Prior to the European settlement of the New World, Indian tribes were "self-governing sovereign political communities," *United States* v. *Wheeler*, 435 U. S. 313, 322–323 (1978), and they still retain some "elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government," *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, 208 (1978). Thus, an Indian tribe generally retains sovereignty by way of tribal self-government and control over other aspects of its internal affairs. *Montana*, *supra*, at 564.

A tribe's inherent sovereignty, however, is divested to the extent it is inconsistent with the tribe's dependent status,

[8] Furthermore, the practical consequences of JUSTICE STEVENS' approach will be severe. JUSTICE STEVENS' conception of tribal zoning authority allows Indian tribes to obtain the power to zone by defining areas on their reservations that contain only a "small percentage" of fee lands. *Post*, at 437–438, n. 2. The uncertainty that would result from the necessarily case-by-case determination of which regulatory body (or bodies, see *post*, at 440–441, n. 3) has zoning jurisdiction over such land, not to mention the uncertainty as to when a tribe will attempt to assert such jurisdiction, would be far worse than that resulting from the scheme discussed *infra*, at 430–432, in which the contours of the zoning authority are clearly defined and resort to the courts to protect tribal interests should not often be required.

that is, to the extent it involves a tribe's "external relations." *Wheeler*, 435 U. S., at 326.[9] Those cases in which the Court has found a tribe's sovereignty divested generally are those "involving the relations between an Indian tribe and nonmembers of the tribe." *Ibid.* For example, Indian tribes cannot freely alienate their lands to non-Indians, *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 667–668 (1974), cannot enter directly into commercial or governmental relations with foreign nations, *Worcester* v. *Georgia*, 6 Pet. 515, 559 (1832), and cannot exercise criminal jurisdiction over non-Indians in tribal courts, *Oliphant*, *supra*, at 195.

This list is by no means exclusive, as *Montana* makes clear. In *Montana*, the Crow Tribe sought to prohibit hunting and fishing within its reservation by anyone not a member of the Tribe. The Court held that the Tribe's inherent sovereignty did not support extending the prohibition on hunting and fishing to fee lands owned by non-Indians. It recognized the general principle that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U. S., at 564. Because regulation of hunting and fishing on fee lands owned by nonmembers of the Tribe did not bear any "clear relationship to tribal self-government or internal relations," *ibid.*, this general principle precluded extension of tribal jurisdiction to the fee lands at issue.

The Yakima Nation contends that the Court's insistence in *Montana* on an express congressional delegation of tribal power over nonmembers is inconsistent with language in *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 153 (1980), that tribal powers are

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[9] Given our disposition of these cases, we need not address whether the Yakima Nation's retained sovereignty might also have been divested by treaty or statute. *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978). See, *e. g.*, *Rice* v. *Rehner*, 463 U. S. 713, 724 (1983).

divested by implication only when "the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government." We do not see this language as inconsistent with *Montana*. As the opinion in *Colville* made clear, that case involved "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members." 447 U. S., at 152. It did not involve the regulation of fee lands, as did *Montana*. Moreover, the Court in *Montana* itself reconciled the two cases, citing *Colville* as an example of the sort of "consensual relationship" that might even support tribal authority over nonmembers on fee lands. 450 U. S., at 565–566.[10]

JUSTICE BLACKMUN takes a slightly different approach, relying particularly on *Colville* and *Wheeler* for the proposition that "tribal sovereignty is not implicitly divested except in those limited circumstances principally involving external powers of sovereignty where the exercise of tribal authority is *necessarily* inconsistent with their dependent status." *Post*, at 451–452. But JUSTICE BLACKMUN ignores what the Court made clear in *Wheeler*, in a passage immediately preceding the one he cites: that regulation of "the relations between an Indian tribe and nonmembers of the tribe" is necessarily inconsistent with a tribe's dependent status, and therefore tribal sovereignty over such matters of "external relations" is divested. 435 U. S., at 326. Indeed, it is precisely this discussion that the Court relied upon in *Montana* as "distinguish[ing] between those inherent powers retained by the tribes and those divested." 450 U. S., at 564.

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[10] The Yakima Nation's reliance on statements about retained tribal sovereignty in *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845 (1985), and *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U. S. 9 (1987), is likewise misplaced. In neither of those cases did the Court decide whether the Indian Tribe had authority over the nonmembers involved. Instead, the Court established an exhaustion rule, allowing the tribal courts initially to determine whether they have jurisdiction, and left open the possibility that the exercise of jurisdiction could be later challenged in federal court. See 471 U. S., at 856–857; 480 U. S., at 16, 19.

There is no contention here that Congress has expressly delegated to the Yakima Nation the power to zone fee lands of nonmembers of the Tribe. Cf. 18 U. S. C. §§ 1151, 1161 (1982 ed., and Supp. V); 33 U. S. C. §§ 1377(e) and (h)(1) (1982 ed., Supp. V). Therefore under the general principle enunciated in *Montana*, the Yakima Nation has no authority to impose its zoning ordinance on the fee lands owned by petitioners Brendale and Wilkinson.

C

Our inquiry does not end here because the opinion in *Montana* noted two "exceptions" to its general principle. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U. S., at 565. Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*, at 566.

The parties agree that the first *Montana* exception does not apply in these cases. Brendale and Wilkinson do not have a "consensual relationship" with the Yakima Nation simply by virtue of their status as landowners within reservation boundaries, as *Montana* itself necessarily decided. The Yakima Nation instead contends that the Tribe has authority to zone under the second *Montana* exception. We disagree.

Initially, we reject as overbroad the Ninth Circuit's categorical acceptance of tribal zoning authority over lands within reservation boundaries. We find it significant that the so-called second *Montana* exception is prefaced by the word "may"—"[a] tribe *may* also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands

within its reservation." *Ibid.* (emphasis added). This indicates to us that a tribe's authority need not extend to all conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," but instead depends on the circumstances. The Ninth Circuit, however, transformed this indication that there may be other cases in which a tribe has an interest in activities of nonmembers on fee land into a rule describing every case in which a tribe has such an interest. Indeed, the Ninth Circuit equated an Indian tribe's retained sovereignty with a local government's police power, which is contrary to *Montana* itself. *Montana* rejected tribal sovereignty to regulate hunting and fishing on fee land owned by non-Indians, which clearly is a power within the police power of local governments.[11]

It is also evident that a literal application of the second exception would make little sense in the circumstances of these cases. To hold that the Tribe has authority to zone fee land when the activity on that land has the specified effect on Indian properties would mean that the authority would last

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[11] JUSTICE BLACKMUN contends that upholding zoning authority does not necessarily "entai[l] a finding of inherent authority for all police powers," reasoning that "[a]s *Montana* itself demonstrates, there may be cases in which tribes assert the power to regulate activities as to which they have no valid interest." *Post*, at 461–462. The errors in this reasoning are twofold. First, JUSTICE BLACKMUN characterizes the decision in *Montana* incorrectly. The Court did not hold in *Montana* that the Tribe had no interest in regulating non-Indian fishing and hunting on fee land. Instead, it held that the Tribe lacked an interest sufficient "to justify tribal regulation." 450 U. S., at 566. Second, JUSTICE BLACKMUN's reasoning confirms, rather than disproves, that recognizing zoning authority here will equate tribal retained sovereignty with the police power. Under JUSTICE BLACKMUN's view, tribes evidently lack authority to exercise a power within the police power only when they have no legitimate interest in the regulation. But this is a meaningless limitation because to be a valid exercise of the police power in the first instance a government regulation must be rationally related to a legitimate state interest. See, *e. g.*, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 491 (1955).

only so long as the threatening use continued. If it ceased, zoning power would revert to the county. Under the District Court's interpretation of *Montana*, not only would regulatory authority depend in the first instance on a factual inquiry into how a tribe's interests are affected by a particular use of fee land, but as circumstances changed over time, so, too, would the authority to zone. Conceivably, in a case like this, zoning authority could vest variously in the county and the Tribe, switching back and forth between the two, depending on what uses the county permitted on the fee land at issue. Uncertainty of this kind would not further the interests of either the Tribe or the county government and would be chaotic for landowners.[12]

Montana should therefore not be understood to vest zoning authority in the tribe when fee land is used in certain ways. The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land. The inquiry thus becomes whether, and to what extent, the tribe has a protectible interest in what activities are taking place on fee land within the reservation and, if it has such an interest, how it may be protected. Of course, under ordinary law, neighbors often have a protectible interest in what is occurring on adjoining property and may seek relief in an appropriate forum, judicial or otherwise. *Montana* suggests that in the special circumstances of checkerboard ownership of lands within a reservation, the tribe has an interest under federal law, defined

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[12] JUSTICE BLACKMUN asserts that his position, that "the general and longer term advantages of comprehensive land management" justify tribal zoning of fee land, avoids this uncertainty. *Post*, at 460. But this broad position would also authorize the Yakima Nation to zone all fee land within reservation boundaries, including that within the incorporated towns of Toppenish, Wapato, and Harrah. Although JUSTICE BLACKMUN purports to avoid this "difficult question," *post*, at 467, n. 9, there appears to be no principled basis on which to exclude the incorporated towns from the Tribe's zoning authority without leading to the very uncertainty JUSTICE BLACKMUN attempts to dismiss as hypothetical, *post*, at 459.

in terms of the impact of the challenged uses on the political integrity, economic security, or the health or welfare of the tribe. But, as we have indicated above, that interest does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe. The impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe. This standard will sufficiently protect Indian tribes while at the same time avoiding undue interference with state sovereignty and providing the certainty needed by property owners.

Since the tribes' protectible interest is one arising under federal law, the Supremacy Clause requires state and local governments, including Yakima County zoning authorities, to recognize and respect that interest in the course of their activities. The Tribe in this case, as it should have, first appeared in the county zoning proceedings, but its submission should have been, not that the county was without zoning authority over fee land within the reservation, but that its tribal interests were imperiled. The federal courts had jurisdiction to entertain the Tribe's suit for declaratory and injunctive relief,[13] but given that the county has jurisdiction to zone fee lands on the reservation and would be enjoinable only if it failed to respect the rights of the Tribe under federal law, the proper course for the District Court in the Brendale phase of this case would have been to stay its hand until the zoning proceedings had been completed. At that time, a judgment could be made as to whether the uses that were actually authorized on Brendale's property imperiled the political integrity, the economic security, or the health or welfare of the Tribe. If due regard is given to the Tribe's protectible interest at all stages of the proceedings, we have every confidence that the nightmarish consequences predicted by JUSTICE BLACKMUN, *post*, at 460–461, will be avoided. Of course

[13] Cf. *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 677 (1974).

if practice proves otherwise, Congress can take appropriate action.

III

The District Court found that Yakima County's exercise of zoning power over the Wilkinson property would have no direct effect on the Tribe and would not threaten the Tribe's political integrity, economic security, or health and welfare. *Whiteside II*, 617 F. Supp., at 755. On the basis of these findings, it is clear that the Wilkinson development and the county's approval of that development do not imperil any interest of the Yakima Nation. Therefore, I would reverse the judgment of the Ninth Circuit as to the Wilkinson property.

The Brendale property presents a different situation. At the time the Tribe filed its suit, the county had agreed with the Tribe that an EIS was required before Brendale's development could go forward. The zoning proceedings had thus not been concluded, and the District Court's judgment was that the county had no power to go forward. That judgment was infirm under the approach outlined in this opinion. The zoning proceedings should have been allowed to conclude, and it may be that those proceedings would adequately recognize tribal interests and make unnecessary further action in the District Court. If it were otherwise, the District Court could then decide whether the uses the State permits on the Brendale property would do serious injury to, and clearly imperil, the protectible tribal interests identified in this opinion. This part of the case in my view should therefore be returned to District Court. A majority of this Court, however, disagrees with this conclusion.

Accordingly, since with respect to the Wilkinson property, JUSTICE STEVENS and JUSTICE O'CONNOR agree that the judgment of the Court of Appeals in Nos. 87–1697 and 87–1711 should be reversed, that is the judgment of the Court in those cases. With respect to the Brendale property, I would vacate the judgment of the Court of Appeals

and remand the case to the Court of Appeals with instructions to vacate the judgment of the District Court and to remand the case to that Court for further proceedings. Because the Court instead affirms the judgment of the Court of Appeals in No. 87–1622, I dissent as to that case.

The judgment in Nos. 87–1697 and 87–1711 is

Reversed.

JUSTICE STEVENS, joined by JUSTICE O'CONNOR, delivered an opinion announcing the judgment of the Court in No. 87–1622 and concurring in the judgment in Nos. 87–1697 and 87–1711.

The United States has granted to many Indian tribes, including the Yakima Nation—"a power unknown to any other sovereignty in this Nation: a power to exclude nonmembers entirely from territory reserved for the tribe." *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 160 (1982) (STEVENS, J., dissenting). That power necessarily must include the lesser power to regulate land use in the interest of protecting the tribal community. Thus, the proper resolution of these cases depends on the extent to which the Tribe's virtually absolute power to exclude has been either diminished by federal statute or voluntarily surrendered by the Tribe itself. The facts of record, which are summarized in JUSTICE WHITE's opinion, *ante*, at, 414–421, dictate a different answer as to the two tracts of land at issue.

I

Zoning is the process whereby a community defines its essential character. Whether driven by a concern for health and safety, esthetics, or other public values, zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually—or more often unilaterally—destructive. As Justice Sutherland observed for the Court in the landmark case of *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926), the power to zone closely parallels the common law of nuisance and thus finds guidance in "the maxim

sic utere tuo ut alienum non laedas"—use your own property in such a manner as not to injure that of another. *Id.*, at 387. Hence, a community reasonably might conclude that a factory has no place in an otherwise exclusively residential section or that an amusement park does not belong in an area devoted to quiet parks, libraries, and schools. As in nuisance law, the issue is ultimately one of whether the proposed land use is—"like a pig in the parlor instead of the barnyard"—"merely a right thing in the wrong place." *Id.*, at 388.

An Indian tribe's power to exclude nonmembers from a defined geographical area obviously includes the lesser power to define the character of that area. In *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324 (1983), a unanimous Court recognized that "[a] tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is . . . well established." *Id.*, at 333. Likewise, in *Merrion*, the Court wrote:

> "Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct . . . . When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power . . . to place . . . conditions on the non-Indian's conduct or continued presence on the reservation." 455 U. S., at 144–145 (footnote omitted) (emphasis in original).

It is difficult to imagine a power that follows more forcefully from the power to exclude than the power to require

that nonmembers, as a condition of entry, not disturb the traditional character of the reserved area.

At one time, the Yakima Nation's power to exclude nonmembers from its reservation was near absolute. This power derived from two sources: The Tribe's aboriginal sovereignty over vast reaches of land in the Pacific Northwest and the express provisions of its 1855 treaty with the United States. Even in the absence of a treaty provision expressly granting such authority, Indian tribes maintain the sovereign power of exclusion unless otherwise curtailed. See *Worcester* v. *Georgia*, 6 Pet. 515, 561 (1832); F. Cohen, Handbook of Federal Indian Law 252 (1982) (hereinafter Cohen); 1 Op. Atty. Gen. 465, 465–467 (1821). As is the case with many tribes, see, *e. g.*, *Montana* v. *United States*, 450 U. S. 544, 548 (1981); *Puyallup Tribe, Inc.* v. *Washington Game Dept.*, 433 U. S. 165, 174 (1977), the Yakima Nation's power to exclude was confirmed through an express treaty provision. Through the 1855 treaty, which was ratified by the Senate and proclaimed by President Buchanan in 1859, the Yakima Nation ceded to the United States millions of acres of land east of the main ridge of the Cascade Mountains in exchange for the guarantee that a defined area of approximately 1.3 million acres would be reserved from the ceded lands "for the use and occupation of the aforesaid confederated tribes and bands of Indians." Treaty between the United States and the Yakima Nation of Indians, 12 Stat. 951–952. The treaty provided that the entire "tract shall be set apart . . . for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation," and that no "white man, excepting those in the employment of the Indian Department, [shall] be permitted to reside upon said reservation without permission of the tribe and the superintendent and agent." *Id.*, at 952. Thus, as of 1859, the Tribe's power to exclude was firmly established. The power to regulate land use ran parallel to the power to exclude. Just as the Tribe had authority to limit absolutely access to the reserva-

tion, so it could also limit access to persons whose activities would conform to the Tribe's general plan for land use.

In 1887, however, the Indian General Allotment Act (Dawes Act), 24 Stat. 388, as amended, 25 U. S. C. § 331 *et seq.*, to some extent reworked fundamental notions of Indian sovereignty. Under the Dawes Act, the President was authorized to allot reservation lands in severalty to resident Indians. Allotted lands were held in trust for members of the Tribe for a period of at least 25 years, after which the members received fee patents and could freely transfer the land to nonmembers. "When all the lands had been allotted and the trusts expired, the reservation could be abolished." *Mattz* v. *Arnett*, 412 U. S. 481, 496 (1973). See also *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U. S. 463, 478–479 (1976). In this manner, the Dawes Act was designed ultimately to abolish Indian reservations while attempting to bring "security and civilization to the Indian." D. Otis, The Dawes Act and the Allotment of Indian Lands 32 (1973). But, not long after the Act took effect it became apparent that its beneficent purpose had failed, and, in 1934, the Indian Reorganization Act, 48 Stat. 984, repudiated the allotment policy. See Cohen 614. In the interim, however, large portions of reservation lands were conveyed to nonmembers such as petitioners Wilkinson and Brendale.[1]

The Dawes Act did not itself transfer any regulatory power from the Tribe to any state or local governmental authority. See *Moe* v. *Confederated Salish and Kootenai Tribes*, *supra*; *Mattz* v. *Arnett*, *supra*. Nonetheless, by providing for the allotment and ultimate alienation of reservation land, the Act in some respects diminished tribal authority. As we recognized in *Montana* v. *United States*, "treaty

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[1] About 90 million acres of tribal land were alienated through allotment and sale of surplus lands by 1934, amounting to approximately two-thirds of the total land held by Indian tribes in 1887. See Cohen 614 (citing Office of Indian Affairs, Dept. of Interior, Indian Land Tenure, Economic Status, and Population Trends (1935)).

rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." 450 U. S., at 561. A statute that authorizes the sale of a parcel of land in a reservation must implicitly grant the purchaser access to that property. In addition, to the extent that large portions of reservation land were sold in fee, such that the Tribe could no longer determine the essential character of the region by setting conditions on entry to those parcels, the Tribe's legitimate interest in land-use regulation was also diminished. Although it is inconceivable that Congress would have intended that the sale of a few lots would divest the Tribe of the power to determine the character of the tribal community, it is equally improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers who lack any voice in setting tribal policy.

Since the Dawes Act provided that individual allotments would be held in trust by the United States for members of the Tribe for a period of at least 25 years, it is evident that the tribal authority over land use within the reservation remained undiminished during that period and at least until actual transfers of land to nonmembers began to occur. The record does not contain a chronology of conveyances of trust lands to nonmembers of the Tribe, but it does disclose the extent of fee ownership of reservation lands at the time these lawsuits began. Most significantly, it establishes that as early as 1954 the Tribe had divided its reservation into two parts, which the parties and the District Court consistently described as the "closed area" and the "open area," and that it continues to maintain the closed area as a separate community. That division, which was made many years before either petitioner Brendale or petitioner Wilkinson acquired title to reservation land, is of critical importance and requires a different disposition of their respective cases.[2]

[2] The labels "closed area" and "open area" are, of course, irrelevant to my analysis. What is important is that the Tribe has maintained a defined

II

Resolutions adopted by the Tribal Council of the Yakima Nation have created what is known officially as the "reservation restricted area," and commonly referred to as the "closed area." Relying on language in the 1855 treaty assuring the Tribe "exclusive use and benefit" of reservation lands, the Council in a 1954 resolution declared "that the open range and forested area of the Yakima Indian Reservation is to *remain* closed to the general public" to protect the area's "grazing, forest, and wildlife resources." Resolution of Yakima Tribal Council (Aug. 4, 1954) (emphasis supplied). Under the 1954 resolution, entry into this area was "restricted to enrolled members of the Yakima Tribe, official agency employees, persons with bona fide property or business interests," close relatives of enrolled members, members of certain other Tribes, and certain permittees. *Ibid.* In addition, the resolution provided that "[e]ntry into closed areas is forbidden all persons while under the influence of liquor." *Ibid.*

Although the closed area occupies about 807,000 acres, consisting of almost two-thirds of the entire reservation, only 25,000 acres are owned in fee. *Yakima Indian Nation* v. *Whiteside*, 617 F. Supp. 735, 741 (ED Wash. 1985). For the most part this area consists of forests, which provide the major source of income to the Tribe. Virtually all of the fee land is owned by lumber companies whose operations are subject to regulation by the Bureau of Indian Affairs (BIA). *Ibid.* Cf. *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136 (1980). Excluding the land owned by these lumber companies, the remaining fee land constitutes less than one percent of the closed area. 617 F. Supp., at 741. There are no permanent inhabitants of the Yakima County portion of the closed area. *Id.*, at 742. One state-maintained highway

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area in which only a very small percentage of the land is held in fee and another defined area in which approximately half of the land is held in fee.

traverses a portion of the area, and several roads maintained by the BIA provide access to the closed area's interior. *Id.*, at 737–738. Apparently, however, the county does not maintain any roads in this portion of the reservation. Cf. *Yakima Indian Nation* v. *Whiteside*, 617 F. Supp. 750, 755 (ED Wash. 1985).

The Tribe operates a "courtesy permit system" that allows selected groups of visitors access to the closed area. In order to protect the area's "'natural foods, medicines,'" and other natural resources, the activities of visitors "are limited to sightseeing, hiking, camping and tribal, BIA or family related business or activity." 617 F. Supp., at 738. Visitors are expressly "prohibited from hunting, fishing, boating, drinking, operating vehicles off established roads, camping at other than designated campsites and removing flora, fauna, petrified wood, other valuable rocks or minerals or artifacts." *Ibid.* Tribal police and game officers enforce the courtesy permit system by monitoring ingress and egress at four guard stations and by patrolling the interior of the closed area. *Ibid.*

Until recently the BIA supported the Tribe's policy of denying entry into the closed area by restricting use of BIA roads to members of the Tribe and a narrowly defined class of permittees. See *ibid.* In litigation with the Government, petitioner Brendale eventually succeeded in establishing a right of access to his own property over BIA roads. See *Brendale* v. *Olney*, No. C–78–145 (ED Wash., Mar. 3, 1981). Moreover, in 1988 the BIA ultimately decided to allow the public to use BIA roads because they had been constructed with public funds. See Letter from James S. Bergmann, Acting Assistant Secretary, Indian Affairs, of April 8, 1988, reprinted in App. to Brief for Petitioner in No. 87–1622, p. 1a. Contrary to the suggestion in JUSTICE WHITE's opinion, see *ante*, at 415–416, n. 2, however, the fact that nonmembers may now drive on these roads does not change the basic character of the closed area or undermine the Tribe's

historic and consistent interest in preserving the pristine character of this vast, uninhabited portion of its reservation.

Petitioner Brendale's property is located in the heart of this closed portion of the reservation. He inherited the property in 1972 from his mother, who had been an enrolled member of the Yakima Nation. In 1982, Brendale filed a proposal with the Yakima County zoning authorities for the development of a 20-acre subdivision consisting of 10 2-acre lots. BIA roads provide the only access to the property, the nearest county road being more than 20 miles away. The proposal contemplates the construction of recreational summer cabins, on-site sewage disposal systems, and interior access roads that would be maintained by a homeowners' association. 617 F. Supp., at 741. The District Court found that the proposal would have a number of adverse environmental consequences and that the only interest that Yakima County possessed in overseeing the use of the Brendale property was that of "providing regulatory functions to its taxpaying citizens." *Id.*, at 741–743. The county did not appeal from the District Court's decision holding that the Tribe has the exclusive authority to regulate land use in the closed area.[3]

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[3] Because the county did not appeal, we are not presented with the question whether the county might possess concurrent zoning jurisdiction over the closed area. The possibility that the county might have jurisdiction to prohibit certain land uses in the closed area does not suggest that the Tribe lacks similar authority. This sort of concurrent jurisdiction, if it does exist, is simply a product of the unique overlapping of governmental authority that characterizes much of our Indian-law jurisprudence. See, *e. g.*, *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163 (1989). Moreover, overlapping land-use regulations are not inherently suspect. The developer of land in the vicinity of an airport, for example, must comply with local zoning laws and federal limitations on the height of buildings that may obstruct air travel. Likewise, federal and state environmental protection requirements may be superimposed on county or tribal zoning ordinances. Although the potential for conflict between a county's rules and a tribe's rules is certainly substantial, it is neither inevitable nor incapable of resolution by a tolerant and cooperative approach to the prob-

Although the logging operations, the construction of BIA roads, and the transfer of ownership of a relatively insignificant amount of land in the closed area unquestionably has diminished the Tribe's power to exclude non-Indians from that portion of its reservation, this does not justify the conclusion that the Tribe has surrendered its historic right to regulate land use in the restricted portion of the reservation. By maintaining the power to exclude nonmembers from entering all but a small portion of the closed area, the Tribe has preserved the power to define the essential character of that area. In fact, the Tribe has exercised this power, taking care that the closed area remains an undeveloped refuge of cultural and religious significance, a place where tribal members "may camp, hunt, fish, and gather roots and berries in the tradition of their culture." Amended Zoning Regulations of the Yakima Indian Nation, Resolution No. 1–98–72, § 23 (1972), reprinted App. 64.

The question is then whether the Tribe has authority to prevent the few individuals who own portions of the closed area in fee from undermining its general plan to preserve the character of this unique resource by developing their isolated parcels without regard to an otherwise common scheme. More simply, the question is whether the owners of the small amount of fee land may bring a pig into the parlor. In my opinion, just as Congress could not possibly have intended in enacting the Dawes Act that tribes would maintain the power to exclude bona fide purchasers of reservation land from that property, it could not have intended that tribes would lose control over the character of their reservations upon the sale of a few, relatively small parcels of land. Neither proposition is explicit in the Dawes Act, yet both appear necessary to a reasonable operation of the allotment process. Cf. *Seymour* v. *Superintendent of Washington State Penitentiary*, 368 U. S. 351, 356 (1962) (allotment "did no more than open

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lems that are generated by the continuing growth and complexity of our diverse society.

the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards"); *Mattz* v. *Arnett*, 412 U. S., at 497 (same). In this sense, the Tribe's power to zone is like an equitable servitude; the burden of complying with the Tribe's zoning rules runs with the land without regard to how a particular estate is transferred. Cf. R. Cunningham, W. Stoebuck, & D. Whitman, Law of Property §§ 8.22–8.32, pp. 485–506 (1984) (hereinafter Cunningham). Indeed, there is strong authority for the proposition that equitable servitudes fall within the same family of property law as easements. See C. Clark, Real Covenants and Other Interests Which "Run with Land" 174–175 (1947); Pound, The Progress of the Law, 1918–1919, Equity, 33 Harv. L. Rev. 813 (1920). There is no basis for concluding that the allotted property carried the benefit of one type of "servitude" and not the burden of the other.

In the *Merrion* case, a majority of this Court went a step beyond this narrow recognition of reserved power. There, the Court held that a tribe's power to impose an oil and gas severance tax on non-Indian lessees of reservation land can be derived from the power to exclude. 455 U. S., at 144–148. In reaching this conclusion, the Court rejected the lessee's contention that in leasing the land to the non-Indians the Tribe relinquished the power to exclude and thus the lesser included power to tax. *Id.*, at 146–148. It is not necessary to go this far, however, to decide the present case. Rather, it is enough to recognize that notwithstanding the transfer of a small percentage of allotted land the Tribe retains its legitimate interest in the preservation of the character of the reservation. The Tribe's power to control the use of discrete, fee parcels of the land is simply incidental to its power to preserve the character of what remains almost entirely a region reserved for the exclusive benefit of the Tribe.

Nor does the Court's decision in *Montana* v. *United States*, 450 U. S. 544 (1981), require a different result. First, the *Montana* case involved a discriminatory land-use regulation. *Id.*, at 549. The Tribe's regulation prohibited non-Indians from hunting or fishing on their own property while members of the Tribe were free to engage in those activities. In contrast, petitioners do not suggest that a member of the Tribe would be allowed to undertake the development Brendale proposes. It is Brendale who seeks a special, privileged status. Second, in the *Montana* case we were careful to point out that the conduct of the non-Indians on their fee lands posed no threat to the welfare of the Tribe. *Id.*, at 566. In sharp contrast, in this case the District Court expressly found that Brendale's

> "planned development of recreational housing places critical assets of the Closed Area in jeopardy. . . . [O]f paramount concern to this court is the threat to the Closed Area's cultural and spiritual values. To allow development in this unique and undeveloped area would drastically diminish those intangible values. That in turn would undoubtedly negatively affect the general health and welfare of the Yakima Nation and its members. This court must conclude therefore that the Yakima Nation may regulate the use that Brendale makes of his fee land within the Reservation's Closed Area." 617 F. Supp., at 744.

Finally, in holding in the *Montana* case that the Tribe could not regulate non-Indian fishing and hunting on fee land within the reservation, we stressed that the State of Montana, and not the Tribe, stocked the river with fish and provided a portion of the game found on the reservation. 450 U. S., at 548. In addition, we held that the State owned the bed of the Big Horn River and thus rejected the Tribe's contention that it was entitled to regulate fishing and duck hunting in the river based on its purported ownership interest.

Id., at 550, n. 1, 556–557. No such state or county interest is asserted in this case.

In my view, the fact that a very small proportion of the closed area is owned in fee does not deprive the Tribe of the right to ensure that this area maintains its unadulterated character. This is particularly so in a case such as this in which the zoning rule at issue is neutrally applied, is necessary to protect the welfare of the Tribe, and does not interfere with any significant state or county interest. Although application of the pre-emption analysis advocated by JUSTICE WHITE provides some assurance that the reservation will not be overrun by various uses inconsistent with important tribal interests, it does not provide a means by which the Tribe can continue to define the character of the restricted area. The incremental shifts in the texture and quality of the surrounding environment occasioned by discrete land-use decisions within an expansive territory are not readily monitored or regulated by considering "whether the uses that were actually authorized on [the relevant] property imperiled the political integrity, the economic security, or the health or welfare of the Tribe." *Ante*, at 431.

I therefore agree with JUSTICE BLACKMUN that the Tribe may zone the Brendale property. The judgment of the Court of Appeals is accordingly affirmed in No. 87–1622.

III

The authority of the Tribe to enact and enforce zoning ordinances applicable in the open area—where petitioner Wilkinson's property is located—requires a different analysis. Although the Tribe originally had the power to exclude non-Indians from the entire reservation, the "subsequent alienation" of about half of the property in the open area has produced an integrated community that is not economically or culturally delimited by reservation boundaries. Because the Tribe no longer has the power to exclude nonmembers from a large portion of this area, it also lacks the power to

define the essential character of the territory. As a result, the Tribe's interest in preventing inconsistent uses is dramatically curtailed. For this reason, I agree with JUSTICE WHITE that the Tribe lacks authority to regulate the use of Wilkinson's property. So long as the land is not used in a manner that is pre-empted by federal law, the Tribe has no special claim to relief. It, of course, retains authority to regulate the use of trust land, and the county does not contend otherwise. See Brief for Petitioners in No. 87–1711, p. 12.

Unlike the closed area, the Tribe makes no attempt to control access to the open area. In this respect, the District Court found that "access to the area is not limited by the Yakima Nation and non-tribal members move freely throughout the area." 617 F. Supp., at 752. The county has constructed and maintained 487 miles of road, all of which are equally accessible to reservation residents and the general public. App. to Pet. for Cert. in No. 87–1697, p. 87a. Although the Tribe has asserted that it has the authority to regulate land use in the three incorporated towns, it has never attempted to do so. In "sharp contrast to the pristine, wilderness-like character of the 'Closed Area,'" the open area is marked by "residential and commercial developmen[t]." 617 F. Supp., at 752.

Members of the Yakima Nation represent less than 20 percent of the open area's total population.[4] *Id.*, at 755. Indians and non-Indians alike are eligible to vote in county elections. Only enrolled members of the Tribe, however, are entitled to participate in tribal elections. 2 Tr. 167. Similarly, while the county provides police protection, public education, and other social services to both Indians and non-Indians, App. to Pet. for Cert. in No. 87–1697, p. 88a; 4 Tr. 546–547, government services provided by the Tribe—

[4] According to the 1980 Census, the total population of the portion of the Yakima Reservation within Yakima County is 24,750, of whom 4,908 are Indians. U. S. Dept. of Commerce, Bureau of Census, 1980 Census of Population 49—460 (Table 192) (1983).

although theoretically available to all residents—are in practice generally used only by members of the Tribe. 2 Tr. 143–144. Furthermore, the District Court found that the county has a substantial interest in regulating land use in the open area—and in particular in protecting "the county's valuable agricultural land"—and that the open area lacks "a unique religious or spiritual significance to the members of the Yakima Nation." 617 F. Supp., at 755.

In contrast to the closed area, almost half of the land in the open area is owned in fee. *Id.*, at 752. The majority of the fee land is located in three incorporated towns in the open area, where approximately 10,000 of the open area's 25,000 residents live. *Id.*, at 752, 755. The remaining portion of the open area, which includes approximately 143,000 acres of irrigated farm land, is largely devoted to agriculture. 3 Tr. 416. About 63,179 acres of this farm land are owned in fee by nonmembers. *Id.*, at 422. Another 67,466 acres of this land are owned by the Yakima Nation or its members, but are leased to non-Indians. *Ibid.* Only 12,355 acres are farmed by tribal members. Petitioner "Wilkinson's property is bordered to the north by trust land and to the east, south and west by fee land." 617 F. Supp., at 754. The 40-acre lot overlooks the Yakima Municipal Airport and is composed of unfarmed, sagebrush land. *Ibid.*

Given that a large percentage of the land in the open area is owned in fee by nonmembers—and that an additional portion is leased to nonmembers—even if the Tribe had exercised its power to exclude nonmembers from trust land, it would have been unable thereby to establish the essential character of the region. In such circumstances, allowing a nonmember to use his or her land in a manner that might not be approved by the tribal council does not upset an otherwise coherent scheme of land use. The Tribe cannot complain that the nonmember seeks to bring a pig into the parlor, for, unlike the closed area, the Tribe no longer possesses the power to determine the basic character of the area. More-

over, it is unlikely that Congress intended to give the Tribe the power to determine the character of an area that is predominantly owned and populated by nonmembers, who represent 80 percent of the population yet lack a voice in tribal governance. Finally, to the extent the open area has lost its character as an exclusive tribal resource, and has become, as a practical matter, an integrated portion of the county, the Tribe has also lost any claim to an interest analogous to an equitable servitude. Under the "change of neighborhood" doctrine, an equitable servitude lapses when the restriction, as applied to "the general vicinity and not merely a few parcels," has "become outmoded," has "lost its usefulness," or has become "'inequitable' to enforce." Cunningham § 8.20, pp. 482–483. See also Restatement of Property § 564 (1944). Because the open area no longer maintains the character of a unique tribal asset and because the Tribe accordingly lacks a substantial interest in governing land use, the power to zone has "become outmoded."

I therefore agree with JUSTICE WHITE's conclusion that the Tribe lacks authority to zone the Wilkinson property.

IV

My conclusion that the dramatically different facts of these two cases should produce different results is subject to the obvious criticism that it does not identify a bright-line rule. The primary responsibility for line-drawing, however, is vested in the legislature. Moreover, line-drawing is inherent in the continuum that exists between those reservations that still maintain their status as distinct social structures and those that have become integrated in other local polities. Any difficulty courts may encounter in drawing the line between "closed" and "open" portions of reservations simply reflects that the factual predicate to these cases is itself complicated. Indeed, JUSTICE WHITE's rule does little to avoid the difficulty of drawing lines and making subtle distinctions. Just as it is neither possible nor appropriate in these cases to set

a fixed percentage of fee ownership that will govern every case that may arise, so is it impossible to articulate precise rules that will govern whenever a tribe asserts that a land use approved by a county board is pre-empted by federal law. And although the rule that JUSTICE BLACKMUN proposes would provide an obvious answer in most cases, he recognizes that "[i]t may be that on some reservations, including the Yakima Reservation, there are essentially self-contained, definable, areas in which non-Indian fee lands so predominate that the tribe has no significant interest in controlling land use." *Post*, at 467, n. 9. Finally, it would be fundamentally unfair to deny appropriate relief to either party in these cases, which involves no difficulty in discerning the proper line, simply because a future case may be more difficult.

Accordingly, in No. 87–1622, the judgment of the Court of Appeals is affirmed. I concur in the judgment in Nos. 87–1697 and 87–1711 reversing the judgment of the Court of Appeals.

The judgment in No. 87–1622 is

Affirmed.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in the judgment in No. 87–1622 and dissenting in Nos. 87–1697 and 87–1711.

The Court's combined judgment in these consolidated cases—splitting tribal zoning authority over non-Indian fee lands between the so-called "open" and "closed" areas of the Yakima Indian Reservation—is Solomonic in appearance only. This compromise result arises from two distinct approaches to tribal sovereignty, each of which is inconsistent with this Court's past decisions and undermines the Federal Government's longstanding commitment to the promotion of tribal autonomy. Because the Court's judgment that the Tribe does not have zoning authority over non-Indian fee lands in the "open" area of its reservation is wrong, in my view, as a matter of law and fashions a patently unworkable legal rule, I dissent in Nos. 87–1697 and 87–1711. Because

JUSTICE STEVENS' opinion reaches the right result for the wrong reason with respect to the Tribe's authority to zone non-Indian fee lands in the closed portion of the reservation, I concur in the judgment in No. 87–1662. I shall discuss JUSTICE WHITE's and JUSTICE STEVENS' opinions *seriatim*.

I

Eight years ago, this Court decided *Montana* v. *United States*, 450 U. S. 544 (1981). In that case, it was ruled that an Indian Tribe did not have the inherent authority to prohibit non-Indian hunting and fishing on fee lands located on a reservation and owned by a non-Indian, where the Tribe did not assert that any right or interest was infringed or affected by the non-Indian conduct. Today, with what seems to me to be no more than a perfunctory discussion of this Court's decisions both before and after *Montana*, JUSTICE WHITE's opinion reads that case as establishing a general rule, modified only by two narrow exceptions, that Indian tribes have no authority over the activities of non-Indians on their reservations absent express congressional delegation. *Ante*, at 425–426.

Applying this rule, JUSTICE WHITE further suggests that *Montana*'s "second exception," which recognizes inherent tribal authority over non-Indian conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," 450 U. S., at 566, does not extend to the right of an Indian tribe to make rational and comprehensive land-use decisions for its reservation. Such a holding would guarantee that adjoining reservation lands would be subject to inconsistent and potentially incompatible zoning policies, and for all practical purposes would strip tribes of the power to protect the integrity of *trust* lands over which they enjoy unquestioned and exclusive authority.

Montana need not, and should not, be read to require such an absurd result. When considered in the full context of the

Court's other relevant decisions, it is evident that *Montana* must be read to recognize the inherent authority of tribes to exercise civil jurisdiction over non-Indian activities on tribal reservations where those activities, as they do in the case of land use, implicate a significant tribal interest.

A

JUSTICE WHITE's opinion reiterates a "general principle" it finds in *Montana* that Indian tribes have no authority over the activities of non-Indians absent express congressional delegation. *Ante*, at 426. Concededly, the Court in *Montana* suggested that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U. S., at 564. But *Montana* is simply one, and not even the most recent, of a long line of our decisions discussing the nature of inherent tribal sovereignty. These cases, landmarks in 150 years of Indian-law jurisprudence, establish a very different "general principle" governing inherent tribal sovereignty—a principle according to which tribes *retain* their sovereign powers over non-Indians on reservation lands unless the exercise of that sovereignty would be "inconsistent with the overriding interests of the National Government." See, *e. g.*, *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 153 (1980). *Montana*, and specifically the two "exceptions" that *Montana* recognizes to its anomalous "general principle," must be read against the rich and extensive background of these cases. When so considered, it is clear to me that nothing in *Montana* precludes, and indeed *Montana* contemplates, the exercise of civil jurisdiction over non-Indian activities on a tribal reservation, including the power to zone fee lands, where those non-Indian reservation activities implicate a significant tribal interest.

1

The crucial step in the process of interpreting *Montana*, and the step that JUSTICE WHITE's opinion neglects, is to place that case in the spectrum of what came before and after it. From a time long before the 13 Colonies declared their independence from England, European nations recognized the native tribes of this continent as self-governing, sovereign, political communities. From this Court's earliest jurisprudence immediately after the American Revolution, it followed the settled understanding of international law that the sovereignty of the individual tribes, "domestic dependent nations" that placed themselves under the protection of the United States, survived their incorporation within the United States, except as *necessarily* diminished.[1] In the landmark *Cherokee Cases*, this Court, through Chief Justice Marshall, held that the dependent status of the tribes divested them only of those aspects of their sovereignty—in particular the authority to engage in governmental relations with foreign powers and the power to alienate land to non-Indians—that were inherently inconsistent with the paramount authority of the United States.[2]

Our approach to inherent tribal sovereignty remained essentially constant in all critical respects in the century and a half between John Marshall's first illumination of the subject and this Court's *Montana* decision. Time and again we stated that, while Congress retains the authority to abrogate tribal sovereignty as it sees fit, tribal sovereignty is not implicitly divested except in those limited circumstances

[1] F. Cohen, Handbook of Federal Indian Law 235 (1982). See also *Worcester* v. *Georgia*, 6 Pet. 515, 560–561 (1832): "[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state."

[2] See *Cherokee Nation* v. *Georgia*, 5 Pet. 1 (1831); *Worcester* v. *Georgia*, 6 Pet. 515 (1832); see also *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823).

principally involving external powers of sovereignty where the exercise of tribal authority is *necessarily* inconsistent with the tribes' dependent status. See, *e. g.*, *United States* v. *Wheeler*, 435 U. S. 313, 326 (1978) (implicit divestiture only of powers "necessarily . . . lost by virtue of a tribe's dependent status"); *Colville*, 447 U. S., at 153–154 (implicit divestiture only "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights").[3]

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[3] JUSTICE WHITE's opinion asserts that *Wheeler* "made clear" that all tribal regulatory authority over relations with non-Indians is necessarily inconsistent with their dependent status and, therefore, divested. *Ante*, at 427. *Wheeler* says no such thing, as is clear when JUSTICE WHITE's opinion's selective quotation is placed in context. The issue in *Wheeler* was whether the conviction of an Indian in tribal court on a charge of contributing to the delinquency of a minor was a federal prosecution such that a second criminal proceeding arising from the same incident would be barred under the Double Jeopardy Clause. The resolution of this issue turned on whether the Tribe's criminal jurisdiction over the Indian defendant stemmed from its own inherent authority or, instead, from federal authority delegated to the Tribe by Congress. After discussing at some length the general rule that Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status, 435 U. S., at 323, the Court held that the Tribe retained inherent authority to punish Indian offenders. The Court first noted that Congress, far from divesting tribes of this power, had consistently recognized it. The Court then turned to the question whether criminal jurisdiction was necessarily divested by virtue of the dependent status of the tribes. The Court stated:

"[T]he sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians

Indeed, what is most remarkable about this Court's jurisprudence of inherent tribal sovereignty is that, except for those few aspects of sovereignty recognized in the *Cherokee Cases* as necessarily divested, the Court only once prior to *Montana* (and never thereafter) has found an additional sovereign power to have been relinquished upon incorporation. In *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191 (1978), we held that tribes have no inherent criminal jurisdiction over non-Indians in tribal court. In light of the nearly universal understanding dating from the origins of this country's dealings with the tribes that they do not possess criminal jurisdiction over non-Indians except as permitted by treaty, and in light of the Federal Constitution's extraordinary protections against intrusions on personal liberty, we concluded that inherent criminal jurisdiction over non-Indians is inconsistent with the dependent status of the tribes. *Id.*, at 208–212. But our decision in *Colville*, which was subsequent to *Oliphant*, expressly establishes that nothing in *Oliphant* negates our historical understanding that the

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the land they occupy. . . . They cannot enter into direct commercial or governmental relations with foreign nations. And, as we have recently held, they cannot try nonmembers in tribal courts.

"These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the power of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe." *Id.*, at 326 (citations omitted).

Clearly, nothing in this discussion suggests that tribes have lost all inherent sovereignty over tribal relations with non-Indians. (Indeed, the Court in *Wheeler* had no cause to address this issue.) *Wheeler* simply stands for the uncontroversial proposition that those specific aspects of inherent sovereignty that necessarily have been divested (criminal jurisdiction over non-Indians, alienation of land, and foreign relations) involve tribal relations with non-Indians. Notably, JUSTICE WHITE's proposed reading of *Wheeler* is in direct conflict with *Montana*, which explicitly recognizes that tribes retain some inherent authority over non-Indians. *Montana* v. *United States*, 450 U. S. 544, 565–566 (1981).

tribes retain substantial *civil* jurisdiction over non-Indians.[4] We there observed that the Federal Government explicitly had recognized for more than a century that "Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest," 447 U. S., at 152, and noted that the historical understandings regarding civil jurisdiction "differ sharply" from those underlying *Oliphant*. 447 U. S., at 153 (upholding inherent tribal authority to tax on-reservation cigarette sales to non-Indians).

Our civil jurisdiction cases subsequent to *Montana* have reaffirmed this view: we have held without equivocation that tribal civil jurisdiction over non-Indians on reservation lands is not an aspect of tribal sovereignty necessarily divested by reason of the tribes' incorporation within the dominant society. In *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130 (1982), we upheld a tribe's inherent authority to impose a severance tax on non-Indian mining on the reservation. This taxing authority, even over non-Indians, we wrote, is an "inherent power necessary to tribal self-government and territorial management." *Id.*, at 141. And in *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U. S. 9 (1987), we noted: "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. . . . Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.*, at 18 (citations omitted).[5]

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[4] Our understanding is consistent with the definitive administrative interpretation of inherent Indian sovereignty: "But over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business." *Powers of Indian Tribes*, 55 I. D. 14, 50 (1934).

[5] JUSTICE WHITE would read *Iowa Mutual Ins. Co.* v. *LaPlante* as not reaching the question whether tribal courts have civil jurisdiction over non-Indians, and dismisses the case as establishing no

These cases, like their predecessors, clearly recognize that tribal civil jurisdiction over non-Indians on reservation lands is consistent with the dependent status of the tribes.

2

Given this background, how should we read *Montana*, where the Court held that the Tribe had no inherent authority to prohibit non-Indians from hunting and fishing on fee lands within the reservation? With respect to *Montana*'s "general principle" creating a presumption against tribal civil jurisdiction over non-Indians absent express congressional delegation, I find it evident that the Court simply missed its usual way. Although the Court's opinion reads as a restatement, not as a revision, of existing doctrine, it contains language flatly inconsistent with its prior decisions defining the scope of inherent tribal jurisdiction, *e. g.*, *Colville*. Notably, in support of its anomalous "general principle," the *Montana* opinion relies mainly on a line of state-law pre-emption cases that address the issue—irrelevant to the issue of inherent tribal sovereignty—as to when *States* may exercise jurisdiction over non-Indian activities on a reservation. See *Montana*, 450 U. S., at 564–566, citing *Fisher* v. *District Court of Sixteenth Judicial District of Montana*, 424 U. S. 382, 386 (1976); *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 171 (1973); and *Williams* v. *Lee*, 358 U. S. 217,

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more than an "exhaustion rule" permitting tribal courts to determine their jurisdiction, or lack thereof, in the first instance. *Ante*, at 427, n. 10. See also *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845 (1985). JUSTICE WHITE, however, has read too little. In holding that the issue of jurisdiction over a civil suit brought against a non-Indian arising from a tort occurring on reservation land must be resolved in the tribal courts in the first instance, *Iowa Mutual* does reaffirm the exhaustion rule established in *National Farmers Union*. But *Iowa Mutual* also stands for the proposition that civil jurisdiction over non-Indians *is* a recognized part of inherent tribal sovereignty and exists "unless affirmatively limited by a specific treaty provision or federal statute." 480 U. S., at 18.

219–220 (1959). Not surprisingly, and of critical importance for deciding the instant cases, the *Montana* presumption has found no place in our subsequent decisions discussing inherent sovereignty.[6] See *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324 (1983); *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845 (1985); *Iowa Mutual Ins. Co.*, *supra*.

But to recognize that *Montana* strangely reversed the otherwise consistent presumption in favor of inherent tribal sovereignty over reservation lands is not to excise the decision from our jurisprudence. Despite the reversed presumption, the plain language of *Montana* itself expressly preserves substantial tribal authority over non-Indian activity on reservations, including fee lands, and, more particularly, may sensibly be read as recognizing inherent tribal authority to zone fee lands.

Montana explicitly recognizes that tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U. S., at 565. Specifically, *Montana* holds that tribes have civil jurisdiction over non-Indians who enter "contracts, leases or other arrangements" with the tribe, *ibid.*, and over non-Indian conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," even if that conduct occurs on fee lands. *Id.*, at 566. Thus, despite *Montana*'s reversal of the usual presumption in favor of inherent sovereignty over reservation activity, the decision reasonably may be read, and, in my view, should be read, to recog-

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[6] Indeed, the only citations that I have found of *Montana*'s rule governing tribal sovereignty appear in the dissent to our decision upholding tribal taxing authority over non-Indians in *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 171 (1982), and in a dissent from the denial of certiorari in a case where the Court of Appeals upheld tribal civil jurisdiction over non-Indians. *City of Polson* v. *Confederated Salish and Kootenai Tribes*, 459 U. S. 977 (1982).

nize that tribes may regulate the on-reservation conduct of non-Indians whenever a significant tribal interest is threatened or directly affected. So construed, *Montana* fits with relative ease into the constellation of this Court's sovereignty jurisprudence.

Under this approach, once the tribe's valid regulatory interest is established, the nature of land ownership does not diminish the tribe's inherent power to regulate in the area. This, too, is consistent with our cases. The Court has affirmed and reaffirmed that tribal sovereignty is in large part geographically determined. "Indian tribes," we have written, "are unique aggregations possessing attributes of sovereignty over both their members *and their territory*." *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975) (emphasis added); see also *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 151 (1980) ("The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty"). We have held that lands obtained under the allotment policy, which permitted non-Indians to purchase lands located within reservations, remain part of those reservations unless Congress explicitly provides to the contrary, *e. g.*, *Mattz* v. *Arnett*, 412 U. S. 481, 498–499 (1973), and that tribal jurisdiction cannot be considered to vary between fee lands and trust lands; the resulting "'impractical pattern of checkerboard jurisdiction'" would be contrary to federal statute and policy. *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U. S. 463, 478 (1976), quoting *Seymour* v. *Superintendent of Washington State Penitentiary*, 368 U. S. 351, 358 (1962). Thus, in *Merrion*, a post-*Montana* case, we cited with approval the Court of Appeals decision in *Buster* v. *Wright*, 135 F. 947 (CA8 1905), appeal dism'd, 203 U. S. 599 (1906), affirming the right of the Tribe to tax non-Indians on non-Indian-owned fee lands: "'[n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed

with the usual powers of municipalities, *nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.*'" *Merrion*, 455 U. S., at 143, quoting *Buster* v. *Wright*, 135 F., at 952 (emphasis added in *Merrion*).

It would be difficult to conceive of a power more central to "the economic security, or the health or welfare of the tribe," *Montana*, 450 U. S., at 566, than the power to zone. "I am in full agreement with the majority that zoning . . . may indeed be the most essential function performed by local government." *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 13 (1974) (MARSHALL, J., dissenting), quoted in part and with approval in *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 80 (1976) (concurring opinion). This fundamental sovereign power of local governments to control land use is especially vital to Indians, who enjoy a unique historical and cultural connection to the land. See, *e. g.*, *FPC* v. *Tuscarora Indian Nation*, 362 U. S. 99, 142 (1960) (Black, J., dissenting). And how can anyone doubt that a tribe's inability to zone substantial tracts of fee land within its own reservation—tracts that are inextricably intermingled with reservation trust lands—would destroy the tribe's ability to engage in the systematic and coordinated utilization of land that is the very essence of zoning authority? See N. Williams, American Land Planning Law § 1.08 (1988). In *Merrion*, we held that the power to impose a severance tax on non-Indian oil and gas producers on the reservation was "an inherent power necessary to tribal self-government and territorial management." 455 U. S., at 141. I am hard pressed to find any reason why zoning authority, a critical aspect of self-government and the ultimate instrument of "territorial management," should not be deemed to lie within the inherent sovereignty of the tribes as well. Thus, if *Montana* is to fit at all within this Court's Indian sovereignty jurisprudence, zoning authority—even over fee lands—must fall within the scope of tribal jurisdiction under *Montana*.

A finding of inherent zoning authority here would in no way conflict with *Montana's* actual holding. As we explicitly recognized in *Mescalero Apache*, 462 U. S., at 331, n. 12, the critical difficulty in *Montana* was the Tribe's failure even to allege that the non-Indians whose fishing and hunting it sought to regulate were in any measure affecting an identifiable tribal interest. See 450 U. S., at 558, n. 6. Indeed, *Montana*, as it subsequently appears in our cases, stands for no more than that tribes may not assert their civil jurisdiction over nonmembers on fee lands absent a showing that, in *Montana*'s words, the non-Indians' "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*, at 566.

3

JUSTICE WHITE's opinion rejects this reading of *Montana* for several reasons, none of which withstand scrutiny. First, his opinion notes that *Montana*'s recognition of tribal sovereignty over non-Indian conduct that threatens the political and economic integrity or health or welfare of the tribe is prefaced by the word "may"—a linguistic turn that the majority reads as suggesting that such tribal sovereignty is not always retained. *Ante*, at 428. Read in context, I think it clear that the Court's use of the word "may" was not an expression of doubt about the existence of tribal sovereignty under the enumerated circumstances, but, rather, was a reflection of the obvious fact that the comment was pure dictum. A more definitive statement on an issue not presented in the case surely would have been inappropriate.

Second, JUSTICE WHITE's opinion suggests that applying *Montana*'s language literally to the problem of zoning fee lands would create the peculiar, and untenable, situation of having zoning authority vary over time between the tribe and the State depending on what effect a proposed land use might have on the tribe. *Ante*, at 429–430. This hypothetical problem is entirely of JUSTICE WHITE's own creation.

Montana's literal language does not require, as he claims, a parcel-by-parcel, use-by-use determination whether a proposed use of fee land will threaten the political integrity, economic security, or health or welfare of the tribe. The threat to the tribe does not derive solely from the proposed uses of specific parcels of fee lands (which admittedly would vary over time and place). The threat stems from the loss of the general and longer term advantages of comprehensive land management.

What the majority offers the tribes falls far short of meeting their legitimate needs. JUSTICE WHITE's opinion fashions a newfangled federal nuisance-type cause of action by which the tribe may bring suit in federal court to enjoin a particular proposed land use that seriously imperils the political integrity, economic security, or health or welfare of the tribe. *Ante*, at 431–432. While resort to this proposed cause of action may ultimately prevent blatantly abusive non-Indian uses of reservation lands, the opportunity to engage in protracted litigation over every proposed land use that conflicts with tribal interests does nothing to recognize the tribe's legitimate sovereign right to regulate the lands within its reservation, with the view to the long-term, active management of land use that is the very difference between zoning and case-by-case nuisance litigation.

JUSTICE WHITE's opinion also claims that it is acting here to protect the expectations of landowners. I agree that the need for certainty in zoning laws is a valid concern. But if JUSTICE WHITE's true concern were with practical consequences, he would never adopt the rule he proposes today. Because we know that the Tribe, and only the Tribe, has authority to zone the trust lands within the reservation, JUSTICE WHITE's opinion, and a majority of the Court with respect to the "open" area, have established a regime that guarantees that neither the State nor the Tribe will be able to establish a comprehensive zoning plan. Although under the majority's rule landowners may be certain as to which

zoning authority controls the use of their land, adjoining parcels of land throughout the "open" area of the reservation (and throughout the entire reservation under JUSTICE WHITE's theory) will be zoned by different zoning authorities with competing and perhaps inconsistent land-use priorities.[7] This, in practice, will be nothing short of a nightmare, nullifying the efforts of both sovereigns to segregate incompatible land uses and exacerbating the already considerable tensions that exist between local and tribal governments in many parts of the Nation about the best use of reservation lands.

In any event, JUSTICE WHITE's opinion does not really explain why the general inability of a tribe to control land use on numerous tracts of land interspersed across its reservation does not inherently threaten the political integrity, economic security, or health or welfare of the tribe. Instead, the opinion claims that to hold that tribes have inherent zoning power over non-Indian fee lands would be to hold that tribes can exercise every police power over such lands, and that such a holding is contrary to the result in *Montana* itself. *Ante*, at 428–429.

This concern is misplaced. It does not necessarily follow that a finding of inherent zoning authority over fee lands on a checkerboarded reservation, an authority indispensable to the fulfillment of a tribe's uncontested right to zone its trust lands, also entails a finding of inherent authority for all police powers. As *Montana* itself demonstrates, there may be cases in which tribes assert the power to regulate activi-

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[7] The checkerboarding problem is evident in this case: Wilkinson's property is bounded by trust land to the north, and fee land to the south, east, and west. *Yakima Indian Nation* v. *Whiteside*, 617 F. Supp. 750, 754 (ED Wash. 1985). Other fee lands are "scattered throughout the reservation in a checkerboard pattern." *Confederated Tribes and Bands of Yakima Indian Nation* v. *Whiteside*, 828 F. 2d 529, 531 (CA9 1987).

ties as to which they have no valid interest.[8] Zoning is clearly not such a case.

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In short, it is my view that under all of this Court's inherent sovereignty decisions, including *Montana*, tribes retain the power to zone non-Indian fee lands on the reservation. JUSTICE WHITE's opinion presents not a single thread of logic for the proposition that such zoning power is inconsistent with the overriding interest of the National Government, and therefore necessarily divested, or that such zoning power is not fundamental to the political and economic security of the tribe, and therefore reserved to the tribe by the plain language of *Montana*. Instead, at the expense of long-recognized tribal rights, many of our precedents, and 150 years of federal policy, JUSTICE WHITE's opinion replaces sovereignty with a form of legal tokenism: the opportunity to sue in court has replaced the opportunity to exercise sovereign authority. This substitution is without sound basis in law, and without practical value.

B

While JUSTICE WHITE's opinion misreads the Court's decisions defining the limits of inherent tribal sovereignty, JUSTICE STEVENS' opinion disregards those decisions altogether. By grounding the Tribe's authority to zone non-Indian fee lands exclusively in its power to exclude non-Indians from the reservation, and by refusing even to consider whether the Tribe's inherent authority might support the zoning of non-Indian fee lands in the "open area," JUSTICE STEVENS' opinion appears implicitly to conclude that tribes have no inherent authority over non-Indians on reservation lands. As

[8] "The complaint in this case did not allege that non-Indian hunting and fishing on reservation lands has impaired" the tribe's hunting and fishing rights. *Montana*, 450 U. S., at 558, n. 6. Moreover, the complaint "did not allege that non-Indian hunting and fishing on fee lands imperil[ed] the subsistence or welfare of the Tribe." *Id.*, at 566.

is evident from my discussion of JUSTICE WHITE's opinion, this conclusion stands in flat contradiction to every relevant Indian sovereignty case that this Court has decided.

JUSTICE STEVENS' opinion also is at odds with this Court's reservation disestablishment decisions. See, *e. g.*, *Seymour* v. *Superintendent of Washington State Penitentiary*, 368 U. S. 351 (1962); *Mattz* v. *Arnett*, 412 U. S. 481 (1973); *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U. S. 463 (1976). JUSTICE STEVENS distinguishes between the "open" and "closed" areas of the reservation on the ground that Congress, in enacting the Dawes Act, could not have intended for tribes to maintain zoning authority over non-Indian fee lands where, as in the "open area" of the Yakima Reservation, the allotment of reservation lands "has produced an integrated community that is not economically or culturally delimited by reservation boundaries." *Ante*, at 444. I fail to see how this distinction can be squared with this Court's decisions specifically rejecting arguments that those reservation areas where the Dawes Act has resulted in substantial non-Indian land ownership should be treated differently for jurisdictional purposes from those areas where tribal holdings predominate. See, *e. g.*, *Seymour*, 368 U. S., at 357–359. And I do not see how JUSTICE STEVENS' theory can be squared with the unequivocal holdings of our cases that the Dawes Act did not diminish the reservation status of reservation lands alienated to non-Indian owners even where that part of the reservation had "'lost its [Indian] identity.'" See, *e. g.*, *Mattz*, 412 U. S., at 484–485.

Precedents aside, JUSTICE STEVENS' opinion points to no authority, either in the text of the Dawes Act or its legislative history, in support of its critical conjecture that "[a]lthough it is inconceivable that Congress would have intended that the sale of a few lots would divest the Tribe of the power to determine the character of the tribal community, it is equally improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of vast ranges

of land sold in fee to nonmembers who lack any voice in setting tribal policy." *Ante*, at 437; see also *ante*, at 446–447. Moreover, even if JUSTICE STEVENS is right about congressional intent at the time of the Dawes Act, why should this matter? "The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, now amended and codified as 25 U. S. C. §461 *et seq.*" *Mattz*, 412 U. S., at 496, n. 18; see also *Moe*, 425 U. S., at 479. Surely, in considering whether Congress intended tribes to enjoy civil jurisdiction, including zoning authority, over non-Indian fee lands in reservation areas where non-Indian ownership predominates, this Court should direct its attention not to the intent of the Congress that passed the Dawes Act, but rather to the intent of the Congress that repudiated the Dawes Act, and established the Indian policies to which we are heir. This 1934 Congress, as definitively interpreted by the Executive Branch at the time, intended that tribal civil jurisdiction extend over "'all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders.'" See n. 4, *supra*, quoting *Powers of Indian Tribes*, 55 I. D. 14, 50 (1934).

On a practical level, JUSTICE STEVENS' approach to zoning authority poses even greater difficulties than JUSTICE WHITE's approach. JUSTICE STEVENS' opinion not only would establish a self-defeating regime of "checkerboard" zoning authority in "open" areas of every reservation, but it would require an intrinsically standardless threshold determination as to when a section of a reservation contains sufficient non-Indian land holdings to warrant an "open" classification. JUSTICE STEVENS' opinion suggests no benchmark for making this determination, and I can imagine none.

Moreover, to the extent that JUSTICE STEVENS' opinion discusses the characteristics of a reservation area where the Tribe possesses authority to zone because it has preserved the "essential character of the reservation," these characteristics betray a stereotyped and almost patronizing view

of Indians and reservation life. The opinion describes the "closed area" of the Yakima Reservation as "pristine," and emphasizes that it is spiritually significant to the Tribe and yields natural foods and medicines. *Ante*, at 439, 439–440. The opinion then contrasts this unadulterated portion of the reservation with the "open area," which is "marked by 'residential and commercial developmen[t].'" *Ante*, at 445 (citation omitted). In my view, even under JUSTICE STEVENS' analysis, it must not be the case that tribes can retain the "essential character" of their reservations (necessary to the exercise of zoning authority), *ibid.*, only if they forgo economic development and maintain those reservations according to a single, perhaps quaint, view of what is characteristically "Indian" today.

In sum, because JUSTICE STEVENS' opinion proposes an approach to tribal authority radically different from, and inconsistent with, our past decisions, because this approach rests on irrelevant conjecture about congressional intent, and because the approach is generally unsound, I cannot concur even partially in JUSTICE STEVENS' opinion, however partially attractive its results. Our past decisions and common sense compel a finding that the Tribe has zoning authority over all the lands within its reservation.

II

Having concluded that the Tribe has the inherent authority to zone non-Indian fee lands, the question remains whether this authority is exclusive or whether it is coextensive with the authority of the State acting through the county. This is not the place for an extended discussion of Indian preemption law. Suffice it to say that our cases recognize that the States have authority to exercise jurisdiction over non-Indian activities on the reservation, see, *e. g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324 (1983), but that this authority is pre-empted if it either "unlawfully infringe[s] 'on the right of reservation Indians to make their own

laws and be ruled by them,'" *White Mountain Apache*, 448 U. S., at 142, quoting *Williams* v. *Lee*, 358 U. S., at 220, or "interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority," *Mescalero Apache*, 462 U. S., at 334. Applying this test, the Court has recognized coextensive state and tribal civil jurisdiction where the exercise of concurrent authority does not do violence to the rights of either sovereign. See, *e. g.*, *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980) (state taxation of on-reservation cigarette purchases does not intrude upon or diminish the Tribe's authority also to tax).

In my view, however, concurrent zoning jurisdiction by its very nature is unworkable. Concurrent zoning authority has the practical effect of nullifying the zoning authority of both sovereigns in every instance where the two establish different permissible land uses for the same tract of land. Presumably, under a scheme of concurrent jurisdiction, every proposed land use would have to satisfy the more stringent of the two competing zoning codes. Such a system obviously would defeat the efforts of both sovereigns to establish comprehensive plans for the systematic use of the lands within their respective jurisdictions.

This Court confronted a similar problem in *Mescalero Apache*. There, the State sought concurrent jurisdiction over non-Indian hunting and fishing on the reservation, even though the State's regulations were in conflict with, and sometimes more restrictive than, the Tribe's regulations. We held that state authority was pre-empted. "It is important to emphasize," the Court stated, "that concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation. Concurrent jurisdiction would empower New Mexico wholly to supplant tribal regulations." 462 U. S., at 338. The same holds true here. Concurrent jurisdiction would defeat the Tribe's abil-

ity to regulate land use on reservation fee lands and, moreover, significantly would impair its ability to zone its trust lands, which in many areas are intermingled with lands over which the State would exercise controlling authority. Accordingly, although the State may assert zoning authority on the reservation in areas where the tribe has not exercised its zoning powers, once a tribe chooses to assert its zoning authority, that authority must be exclusive.[9]

This conclusion, though not derived from federal statutory law, finds considerable support in the Federal Government's active and "longstanding policy of encouraging tribal self-government." *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U. S., at 14. Federal Indian policy "includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development,'" *Mescalero Apache*, 462 U. S., at 335, quoting *White Mountain Apache*, 448 U. S., at 143, and we have long recognized that tribal authority over on-reservation conduct must be "construed generously in order to comport . . . with the federal policy of encouraging tribal independence." *Id.*, at 144. I shall not rehearse the many federal statutes noted by the Court of Appeals that recognize tribal sovereignty and encourage tribal self-government. Some of these specifically facilitate and encourage tribal management of Indian resources and promote the transfer of zoning authority from the Federal Government to the tribe. See *Confeder-*

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[9] It may be that on some reservations, including the Yakima Reservation, there are essentially self-contained, definable, areas in which non-Indian fee lands so predominate that the tribe has no significant interest in controlling land use. I note that the Yakima Reservation includes three incorporated towns—Harrah, Toppenish, and Wapato—that comprise almost exclusively non-Indian fee lands. *Confederated Tribes and Bands of the Yakima Indian Nation* v. *Whiteside*, 828 F. 2d, at 531. Since the Tribe never has attempted to zone lands within the incorporated towns, this litigation does not present the difficult question whether the Tribe's interest in comprehensive zoning is sufficient to justify its exercise of zoning authority over a discrete portion of the reservation which includes no appreciable percentage of trust lands.

ated Tribes and Bands of Yakima Indian Nation v. *Whiteside*, 828 F. 2d 529, 533 (CA9 1987).

Unlike the Court of Appeals, I find no room here for a remand to consider more closely the nature of the county's conflicting interests. When it is determined that the Tribe, which is the one entity that has the power to zone trust lands, also has the power to zone fee lands, the inherent unworkability of concurrent zoning requires the conclusion that the Tribe's power to zone, once it chooses to exercise that power, is exclusive. No further balancing of interests is required. Thus, I would hold that, as to both "open" and "closed" lands, the County of Yakima is without authority to zone reservation lands, including fee lands.[10]

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[10] I agree with JUSTICE WHITE, *ante*, at 415–416, n. 2, that subsequent events have obliterated the distinction between the so-called "open" and "closed" areas of the reservation that informed both the District Court and the Court of Appeals decisions. Absent this distinction, I see no difference between the Brendale and Wilkinson properties and, therefore, disagree with the Court of Appeals that these cases should be remanded to the District Court for consideration of the State's interest in zoning the Wilkinson property. As the Court of Appeals concluded, the Tribe has established a sufficient interest in zoning the Wilkinson property to support its inherent power to zone. Because of the unworkability of concurrent zoning, the State is pre-empted from zoning that land.

Syllabus

BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK ET AL. *v.* FOX ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 87–2013. Argued February 22, 1989—Decided June 29, 1989

Resolution 66–156 of the State University of New York (SUNY) prohibits its private commercial enterprises from operating in SUNY facilities. After the resolution was applied by campus police to bar American Future Systems, Inc. (AFS), from demonstrating and selling its housewares at a party hosted in a student dormitory, respondent Fox and other students sued for a declaratory judgment that such action violated the First Amendment. The District Court preliminarily enjoined enforcement of the resolution but, after a trial, found for SUNY on the ground that its dormitories did not constitute a public forum for purposes of commercial activity, and that the restrictions on speech were reasonable in light of the dormitories' purpose. Viewing the challenged application of the resolution as a restriction on commercial speech, and therefore applying the test articulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, the Court of Appeals concluded that it was unclear whether the resolution directly advanced the State's asserted interests and whether, if it did, it was the least restrictive means to that end. The court therefore reversed and remanded to the trial court.

Held:

1. The Court of Appeals erred in requiring the District Court to apply a least-restrictive-means test to Resolution 66–156. Pp. 473–481.

(a) The AFS parties the students seek to hold propose a commercial transaction and therefore constitute commercial speech. Although they also touch upon other subjects, such as how to be financially responsible and run an efficient home, this does not render them noncommercial in their entirety on the theory that fully protected, educational speech and commercial speech are "inextricably intertwined." *Riley* v. *National Federation of Blind of North Carolina, Inc.*, 487 U. S. 781, distinguished. Pp. 473–475.

(b) Although *Central Hudson* and other decisions have occasionally contained statements suggesting that government restrictions on commercial speech must constitute the least restrictive means of achieving the governmental interests asserted, those decisions have never required that the restriction be absolutely the least severe that will

achieve the desired end. Rather, the decisions require only a reasonable "fit" between the government's ends and the means chosen to accomplish those ends. See, *e. g.*, *Posadas de Puerto Rico Associates* v. *Tourism Company of Puerto Rico*, 478 U. S. 328, 341; *In re R. M. J.*, 455 U. S. 191, 203. So long as the means are narrowly tailored to achieve the desired objective, it is for governmental decisionmakers to judge what manner of regulation may be employed. Pp. 475–481.

2. Respondents' overbreadth claim—which is based on the assertion that Resolution 66–156 impermissibly prohibits their fully protected, noncommercial speech—is not ripe for resolution in this Court. Pp. 481–486.

(a) Although overbreadth analysis does not normally apply to commercial speech, Resolution 66–156 must be deemed to reach some noncommercial speech in light of evidence that it prohibits for-profit job counseling, tutoring, legal advice, and medical consultation in students' dormitory rooms. While such conduct consists of speech for profit, it does not satisfy the definition of commercial speech since it does not *propose* a commercial transaction. Pp. 481–482.

(b) The overbreadth doctrine was designed as a departure from traditional rules of standing, enabling persons who are themselves unharmed by a statute to challenge it facially on the ground that it may be applied unconstitutionally to others, in situations not before the Court. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610, 613. Respondents' invocation of the doctrine is unusual because the asserted extensions of Resolution 66–156 beyond commercial speech that are the basis for their challenge are not hypothetical applications to third parties, but applications to respondents themselves, which were part of the subject of the complaint and the testimony adduced at trial. Nevertheless, there is no reason why the doctrine cannot be invoked in this situation. Pp. 482–484.

(c) However, an as-applied challenge should ordinarily be decided before an overbreadth claim, for reasons relating both to the proper functioning of courts and to their efficiency. Here, neither of the courts below ever considered respondents' as-applied challenge under the proper legal standards, nor apparently even recognized that the case involves both commercial and noncommercial speech. On remand, the question whether Resolution 66–156's alleged substantial overbreadth makes it unenforceable should be addressed only if it is first determined that its application to speech in either category is valid. Pp. 484–486.

841 F. 2d 1207, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, O'CONNOR, and KENNEDY, JJ., joined.

BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 486.

O. Peter Sherwood, Solicitor General of New York, argued the cause for petitioners. With him on the briefs were *Robert Abrams*, Attorney General, *Peter H. Schiff* and *Lawrence S. Kahn*, Deputy Solicitors General, and *Daniel Smirlock*, Assistant Attorney General.

Henry T. Reath argued the cause and filed a brief for respondents.*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end.

I

The State University of New York (SUNY) has promulgated regulations governing the use of school property, including dormitories. One of these, Resolution 66–156 (1979), states:

> "No authorization will be given to private commercial enterprises to operate on State University campuses or

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*Briefs of *amici curiae* urging reversal were filed for the American Council on Education et al. by *Richard D. Marks* and *Sheldon E. Steinbach;* and for the Board of Trustees of the University of Alabama et al. by *Roderick K. Daane*, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, and *Lacy H. Thornburg*, Attorney General of North Carolina.

Briefs of *amici curiae* urging affirmance were filed for the American Advertising Federation, Inc., by *David S. Versfelt*, *William W. Rogal*, and *Gilbert H. Weil;* for the Landmark Legal Foundation by *Mark J. Bredemeier*, *Jerald L. Hill*, and *Jonathan W. Emord;* and for the Student Association of the State University of New York, Inc., et al. by *Lanny E. Walter*.

Marsha S. Berzon and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae*.

> in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events."

American Future Systems, Inc. (AFS), is a company that sells housewares, such as china, crystal, and silverware, to college students; it markets its products exclusively by the technique popularly called (after the company that pioneered it) "Tupperware parties." This consists of demonstrating and offering products for sale to groups of 10 or more prospective buyers at gatherings assembled and hosted by one of those prospective buyers (for which the host or hostess stands to receive some bonus or reward).

In October 1982, an AFS representative was conducting a demonstration of the company's products in a student's dormitory room at SUNY's Cortland campus. Campus police asked her to leave because she was violating Resolution 66–156. When she refused, they arrested her and charged her with trespass, soliciting without a permit, and loitering. Respondent Fox, along with several fellow students at SUNY/Cortland, sued for declaratory judgment that in prohibiting their hosting and attending AFS demonstrations, and preventing their discussions with other "commercial invitees" in their rooms, Resolution 66–156 violated the First Amendment. AFS joined the students as a plaintiff. The District Court granted a preliminary injunction, *American Future Systems, Inc.* v. *State University of New York College at Cortland*, 565 F. Supp. 754 (NDNY 1983), but, after a trial, found for the university on the ground that the SUNY dormitories did not constitute a public forum for the purpose of commercial activity and that the restrictions on speech were reasonable in light of the dormitories' purpose, 649 F. Supp. 1393 (1986).

A divided panel of the Court of Appeals for the Second Circuit reversed and remanded. 841 F. 2d 1207 (1988). Be-

cause AFS had dropped out of the suit as a party, the only remaining issue was the students' claim that their First Amendment rights had been infringed. Viewing the challenged application of Resolution 66–156 as a restriction on commercial speech, and therefore applying the test articulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557 (1980), the Court of Appeals concluded that it was unclear whether Resolution 66–156 directly advanced the State's asserted interests and whether, if it did, it was the least restrictive means to that end. The Court of Appeals therefore reversed the judgment and remanded to the trial court for "a suitable order" based upon "appropriate findings" on these points.[1] We granted certiorari, 488 U. S. 815 (1988).

II

In reviewing the reasoning the Court of Appeals used to decide this case,[2] the first question we confront is whether the principal type of expression at issue is commercial speech. There is no doubt that the AFS "Tupperware parties" the students seek to hold "propose a commercial transaction," *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 762 (1976), which is the

[1] On October 3, 1988, the same day on which we granted certiorari, the District Court issued its decision on remand, striking down Resolution 66–156 because it did not accomplish the State's goals through the least restrictive means possible. 695 F. Supp. 1409 (NDNY). By stipulation of the parties the District Court stayed its mandate and all further proceedings pending our action. See Stipulation, No. 82-CV-1363 (Nov. 23, 1988).

[2] Besides attacking the judgment on the ground that the Court of Appeals misperceived the constitutional principles governing restriction of commercial speech, the State argues that the resolution should be upheld even if the speech here was not commercial, because SUNY dormitories are not a public forum, and the restrictions constitute permissible "time, place, and manner" limitations. Pursuing such an analysis would require us to resolve both legal and factual issues that the Court of Appeals did not address. Since we find that the Court of Appeals must be reversed on the basis of its own analysis, we decline to go further.

test for identifying commercial speech, see *Posadas de Puerto Rico Associates* v. *Tourism Company of Puerto Rico*, 478 U. S. 328, 340 (1986). They also touch on other subjects, however, such as how to be financially responsible and how to run an efficient home. Relying on *Riley* v. *National Federation of Blind of North Carolina, Inc.*, 487 U. S. 781, 796 (1988), respondents contend that here pure speech and commercial speech are "inextricably intertwined," and that the entirety must therefore be classified as noncommercial. We disagree.

Riley involved a state-law requirement that in conducting fundraising for charitable organizations (which we have held to be fully protected speech) professional fundraisers must insert in their presentations a statement setting forth the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charities (instead of retained as commissions). In response to the State's contention that the statement was merely compelled commercial speech, we responded that, if so, it was "inextricably intertwined with otherwise fully protected speech," and that the level of First Amendment scrutiny must depend upon "the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Ibid.* There, of course, the commercial speech (if it was that) *was* "inextricably intertwined" because the state law *required* it to be included. By contrast, there is nothing whatever "inextricable" about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

Including these home economics elements no more converted AFS' presentations into educational speech, than

opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech. As we said in *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 67–68 (1983), communications can "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. . . . We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S., at 563, n. 5." We discuss this case, then, on the basis that commercial speech is at issue.

We have described our mode of analyzing the lawfulness of restrictions on commercial speech as follows:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson*, *supra*, at 566.

The Court of Appeals held, and the parties agree, that the speech here proposes a lawful transaction, is not misleading, and is therefore entitled to First Amendment protection. The Court of Appeals also held, and we agree, that the governmental interests asserted in support of the resolution are substantial: promoting an educational rather than commercial atmosphere on SUNY's campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility. The Court of Appeals did not decide, however, whether Resolution 66–156 directly advances these interests, and whether the regulation it imposes

is more extensive than is necessary for that purpose. As noted earlier, it remanded to the District Court for those determinations. We think that remand was correct, since further factual findings had to be made. It is the terms of the remand, however, that are the major issue here—specifically, those pertaining to the last element of the *Central Hudson* analysis. The Court of Appeals in effect instructed the District Court that it could find the resolution to be "not more extensive than is necessary" only if it is the "least restrictive measure" that could effectively protect the State's interests.

Our cases have repeatedly stated that government restrictions upon commercial speech may be no more broad or no more expansive than "necessary" to serve its substantial interests, see, *e. g.*, *Central Hudson*, 447 U. S., at 566; *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 507–508 (1981) (plurality opinion); *In re R. M. J.*, 455 U. S. 191, 203 (1982); *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 644 (1985); *Posadas de Puerto Rico Associates* v. *Tourism Company of Puerto Rico*, *supra*, at 343; *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U. S. 522, 535 (1987); *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466, 472 (1988). If the word "necessary" is interpreted strictly, these statements would translate into the "least-restrictive-means" test used by the Court of Appeals here. There are undoubtedly formulations in some of our cases that support this view—for example, the statement in *Central Hudson* itself that "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." 447 U. S., at 564. We have indeed assumed in dicta the validity of the "least-restrictive-means" approach. See *Zauderer*, *supra*, at 644, 651, n. 14. However, as we long ago had occasion to observe with respect to the Necessary and Proper Clause of the Constitution, see *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), the word "nec-

essary" is sometimes used more loosely. And other formulations in our commercial speech cases support a more flexible meaning for the *Central Hudson* test. In *In re R. M. J.*, for example, we said that restrictions designed to prevent deceptive advertising must be "narrowly drawn," 455 U. S., at 203, and "no more extensive than reasonably necessary to further substantial interests," *id.*, at 207; see also *id.*, at 203. We repeated the latter formulation last Term in *Shapero* v. *Kentucky Bar Assn.*, *supra*, at 472. In *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, *supra*, at 537, n. 16, we said that the application of the *Central Hudson* test was "substantially similar" to the application of the test for validity of time, place, and manner restrictions upon protected speech—which we have specifically held does *not* require least restrictive means. *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288 (1984); see also *infra*, at 478. Whatever the conflicting tenor of our prior dicta may be, we now focus upon this specific issue for the first time, and conclude that the reason of the matter requires something short of a least-restrictive-means standard.

Our jurisprudence has emphasized that "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). The ample scope of regulatory authority suggested by such statements would be illusory if it were subject to a least-restrictive-means requirement, which imposes a heavy burden on the State. See *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960); see also *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 467 (1977). Cf. *Widmar* v. *Vincent*, 454 U. S. 263, 279, n. 3 (1981) (STEVENS, J., concurring in judgment).

We have refrained from imposing a least-restrictive-means requirement—even where core political speech is at issue—in assessing the validity of so-called time, place, and manner re-

strictions. We uphold such restrictions so long as they are "narrowly tailored" to serve a significant governmental interest, *Clark* v. *Community for Creative Non-Violence*, *supra*, at 293; *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 808 (1984), a standard that we have not interpreted to require elimination of all less restrictive alternatives, see, *e. g.*, *Community for Creative Non-Violence*, *supra*, at 299; *Regan* v. *Time, Inc.*, 468 U. S. 641, 657 (1984) (plurality opinion) ("The less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation"). Similarly with respect to government regulation of expressive conduct, including conduct expressive of political views. In requiring that to be "narrowly tailored" to serve an important or substantial state interest, see *Community for Creative Non-Violence*, *supra*, at 293, 298 (discussing *United States* v. *O'Brien*, 391 U. S. 367 (1968)); *Taxpayers for Vincent*, *supra*, at 804–805, we have not insisted that there be no conceivable alternative, but only that the regulation not "burden substantially more speech than is necessary to further the government's legitimate interests," *Ward* v. *Rock Against Racism*, 491 U. S. 781, 799 (1989). And we have been loath to second-guess the Government's judgment to that effect. See *Community for Creative Non-Violence*, *supra*, at 299; *United States* v. *Albertini*, 472 U. S. 675, 689 (1985). While these two lines of authority do not of course govern here, we think it would be incompatible with the asserted "subordinate position [of commercial speech] in the scale of First Amendment values" to apply a more rigid standard in the present context.[3]

[3] It is interesting that in the expressive conduct and time, place, and manner contexts, where, as just discussed, it is now well established that a least-restrictive-means standard does not apply, we have sometimes used the same sort of "necessity" language which is the asserted precedential authority for that standard in commercial speech cases. For example, in *United States* v. *O'Brien*, 391 U. S. 367, 376–377 (1968), we stated that restrictions on expressive conduct must be "no greater than essential." And in *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789,

None of our cases invalidating the regulation of commercial speech involved a provision that went only marginally beyond what would adequately have served the governmental interest. To the contrary, almost all of the restrictions disallowed under *Central Hudson*'s fourth prong have been substantially excessive, disregarding "far less restrictive and more precise means." *Shapero* v. *Kentucky Bar Assn.*, 486 U. S., at 476. See, *e. g.*, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985); *In re R. M. J.*, 455 U. S. 191 (1982); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977). On the other hand, our decisions *upholding* the regulation of commercial speech cannot be reconciled with a requirement of least restrictive means. In *Posadas*, for example, where we sustained Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents, we did not first satisfy ourselves that the governmental goal of deterring casino gambling could not adequately have been served (as the appellant contended) "not by suppressing commercial speech that might *encourage* such gambling, but by promulgating additional speech designed to *discourage* it." 478 U. S., at 344. Rather, we said that it was "up to the legislature to decide" that point, so long as its judgment was reasonable. *Ibid.* Similarly, in *Metromedia, Inc.* v. *San Diego*, 453 U. S., at 513 (plurality opinion), where we upheld San Diego's complete ban of off-site billboard advertising, we did not inquire whether *any* less restrictive measure (for example, controlling the size and appearance of the signs) would suffice to meet the city's concerns for traffic safety and esthetics. It was enough to conclude that the ban was "perhaps the only effective approach." *Id.*, at 508. And in *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U. S., at 539, it was enough to uphold the restrictions

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810 (1984), we sustained the time, place, and manner restriction because it "curtail[ed] no more speech than [was] necessary to accomplish its purpose."

placed on commercial speech by a federal trademark statute that they were "not broader than Congress reasonably could have determined to be necessary."

In sum, while we have insisted that "'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful,'" *Shapero*, *supra*, at 478, quoting *Zauderer*, *supra*, at 646, we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," *Posadas*, *supra*, at 341—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," *In re R. M. J.*, *supra*, at 203; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

We reject the contention that the test we have described is overly permissive. It is far different, of course, from the "rational basis" test used for Fourteenth Amendment equal protection analysis. See, *e. g.*, *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 109–110 (1949). There it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost. Here we require the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, see *Zauderer*, *supra*, at 647, it must affirmatively establish the reasonable fit we require. By declining to impose, in addition, a least-restrictive-means requirement, we

take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the Legislative and Executive Branches needed leeway in a field (commercial speech) "traditionally subject to governmental regulation," *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S., at 455–456. Far from eroding the essential protections of the First Amendment, we think this disposition strengthens them. "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Id.*, at 456.

III

Finally, we must address respondents' objection that, even if the principal First Amendment interests they asserted involve commercial speech and have not improperly been restricted, Resolution 66–156 must nonetheless be invalidated as overbroad, since it prohibits as well fully protected, *non*commercial speech. Although it is true that overbreadth analysis does not normally apply to commercial speech, see *Bates* v. *State Bar of Arizona*, *supra*, at 380–381; *Ohralik*, *supra*, at 462, n. 20; *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 496–497 (1982), that means only that a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground—our reasoning being that commercial speech is more hardy, less likely to be "chilled," and not in need of surrogate litigators. See *Bates* v. *State Bar of Arizona*, *supra*; *Ohralik* v. *Ohio State Bar Assn.*, *supra*. Here, however, although the principal attack upon the resolution concerned its application to commercial speech, the alleged overbreadth (if the commercial-speech application is assumed to be valid) consists of its application to *non*commercial speech, and that is what counts. Cf. *Bigelow* v. *Virginia*,

421 U. S. 809, 815–819 (1975); *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, *supra*, at 495–497.

On the record before us here, Resolution 66–156 must be deemed to reach some noncommercial speech. A stipulation entered into by the university stated that the resolution reaches any invited speech "where the end result is the intent to make a profit by the invitee." App. 87. More specifically, a SUNY deponent authorized to speak on behalf of the university under Federal Rule of Civil Procedure 30(b)(6) testified that the resolution would prohibit for-profit job counseling in the dormitories, *id.*, at 133; and another SUNY official testified that it would prohibit tutoring, legal advice, and medical consultation provided (for a fee) in students' dormitory rooms, see *id.*, at 162, 181–183. While these examples consist of speech for a profit, they do not consist of speech that *proposes* a commercial transaction, which is what defines commercial speech, see *Virginia Pharmacy Board*, 425 U. S., at 761 (collecting cases). Some of our most valued forms of fully protected speech are uttered for a profit. See, *e. g.*, *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*.

In addition to being clear about the difference between commercial and noncommercial speech, it is also important to be clear about the difference between an as-applied and an overbreadth challenge. Quite obviously, the rule employed in as-applied analysis that a statute regulating commercial speech must be "narrowly tailored," which we discussed in the previous portion of this opinion, prevents a statute from being overbroad. The overbreadth doctrine differs from that rule principally in this: The person invoking the commercial-speech narrow-tailoring rule asserts that *the acts of his that are the subject of the litigation* fall outside what a properly drawn prohibition could cover. As we put it in *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S., at 462, he "attacks the validity of [the statute] not facially, but as applied to his acts of solicitation," whereas the person invoking overbreadth "may

challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him," *id.*, at 462, n. 20. Thus in *Bates*, the case that established the nonapplicability of overbreadth analysis to commercial speech, we said that appellants could not "expect to benefit [from the statute's overinclusiveness] regardless of the nature of their acts," 433 U. S., at 380, and framed as the relevant question "Is . . . *appellants' advertisement* outside the scope of basic First Amendment protection?" *id.*, at 381 (emphasis added). Where an overbreadth attack is successful, the statute is obviously invalid in *all* its applications, since every person to whom it is applied can defend on the basis of the same overbreadth. A successful attack upon a commercial-speech restriction on narrow-tailoring grounds, by contrast, does not assure a defense to those whose own commercial solicitation *can* be constitutionally proscribed—though obviously the rationale of the narrow-tailoring holding may be so broad as to render the statute effectively unenforceable. See, *e. g.*, *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557 (1980); *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466 (1988).

Ordinarily, the principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application *to someone else*. Respondents' invocation of the doctrine in the present case is unusual in that the asserted extensions of Resolution 66–156 beyond commercial speech that are the basis for their overbreadth challenge are not hypothetical applications to third parties, but applications to the student respondents themselves, which were part of the subject of the complaint and of the testimony adduced at trial. Perhaps for that reason, the overbreadth issue was not (in the District Court at least) set forth in the normal fashion—viz., by arguing that even if the commercial applications of the resolution are valid, its noncommercial applications are not, and this invalidates its commercial applications as well. Rather, both commercial and

(less prominently) noncommercial applications were attacked on their own merit—with no apparent realization, we might add, on the part of either respondents or the District Court, that separate categories of commercial speech and noncommercial speech, rather than simply various types of commercial speech, were at issue.

The First Amendment doctrine of overbreadth was designed as a "departure from traditional rules of standing," *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973), to enable persons who are themselves unharmed by the defect in a statute nevertheless "to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court," *id.*, at 610. We see no reason, however, why the doctrine may not be invoked in the unusual situation, as here, where the plaintiff has *standing* to challenge *all* the applications of the statute he contends are unlawful, but his challenge to *some* of them (here, the commercial applications of the statute, assuming for the moment they are valid) will fail unless the doctrine of overbreadth is invoked. It would make little sense to reject these plaintiffs' as-applied attack upon the statute's restriction of commercial speech (on the ground that in its commercial-speech applications the statute *is* narrowly tailored) and to preclude them from attacking that restriction on grounds that the statute is overbroad (because they have standing to attack its overbroad applications directly and therefore cannot invoke the overbreadth doctrine)—and then, next week, to permit some person whose noncommercial speech is *not* restricted (so that he has no standing to attack that aspect of the statute directly) to *succeed* in his attack on the commercial applications because the statute is overbroad. In other words, while the overbreadth doctrine was born as an expansion of the law of standing, it would produce absurd results to limit its application strictly to that context.

It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth

issue unnecessarily—that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws. Moreover, the overbreadth question is ordinarily more difficult to resolve than the as-applied, since it requires determination whether the statute's overreach is *substantial*, not only as an absolute matter, but "judged in relation to the statute's plainly legitimate sweep," *Broadrick* v. *Oklahoma*, *supra*, at 615, and therefore requires consideration of many more applications than those immediately before the court. Thus, for reasons relating both to the proper functioning of courts and to their efficiency, the lawfulness of the particular application of the law should ordinarily be decided first.

In the present case, it has not yet been properly determined that the restrictions on respondents' commercial speech are valid as applied. In fact, neither the legal issues nor the factual questions involved in that portion of the case have been separately addressed by either of the courts below. As we have described, the District Court held that the restrictions on both types of speech were valid without specifically considering (or apparently even recognizing the presence of) noncommercial speech; and the Court of Appeals reversed, again without separate analysis of noncommercial speech, for failure to apply the least-restrictive-means test—which, as we have held, was error. We decline to resolve those as-applied challenges here, not only for reasons of economy but also because a holding for respondents would produce a final judgment in their favor, according them more relief than they obtained from the Court of Appeals (which entered only a remand). Such a result is generally impermissible where, as here, respondents have not filed a cross-petition for certiorari. See R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 382–387 (6th ed. 1986). For the same rea-

sons, and indeed *a fortiori*, we decline to resolve here the issue normally subsequent to rejection of the as-applied challenge, whether the statute is overbroad. We remand this case for determination, pursuant to the standards described above, of the validity of this law's application to the commercial and noncommercial speech that is the subject of the complaint; and, if its application to speech in either such category is found to be valid, for determination whether its substantial overbreadth nonetheless makes it unenforceable.

* * *

The judgment of the Court of Appeals is reversed, and the case remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The majority holds that "least-restrictive-means" analysis does not apply to commercial-speech cases, a holding it is able to reach only by recasting a good bit of contrary language in our past cases.[1] I would have preferred to leave the least-restrictive-means question to another day, and dispose of the case on the alternative—and, in this case, narrower—ground

[1] The majority concedes that it must repudiate the Court's repeated assertion that regulation of commercial speech may be "not more extensive than is necessary to serve [a substantial governmental] interest" in order to decide that "least-restrictive-means" analysis does not apply to commercial-speech cases. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 566 (1980); see *ante*, at 476–477. Indeed, to reach its result, the majority must characterize as "dicta" the Court's reference to "least-restrictive-means" analysis in *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 644 (1985), see *ante*, at 476, although this reference seems integral to the Court's holding that the ban on attorney advertising at issue there was not "necessary to the achievement of a substantial governmental interest."

of overbreadth.[2] While respondents failed to file a cross-petition on the issue, this omission is not a jurisdictional barrier, see *Berkemer* v. *McCarty*, 468 U. S. 420, 435–436, n. 23 (1984), and is more than outweighed by the opportunity the overbreadth claim affords to avoid a substantial revision of the Court's precedents in the area of commercial speech.

That Resolution 66–156 is substantially overbroad in its potential application to noncommercial speech is readily apparent. As the university interprets the resolution, any speech in a dormitory room for which the speaker receives a profit is speech by a "private commercial enterprise," prohibited by the resolution. See *ante*, at 482–483. As the majority correctly observes, *ante*, at 482, the resolution so interpreted prohibits not only commercial speech (*i. e.*, speech proposing a commercial transaction), but also a wide range of speech that receives the fullest protection of the First Amendment. We have been told by authoritative university officials that the resolution prohibits a student from meeting with his physician or lawyer in his dorm room, if the doctor or lawyer is paid for the visit. We have similarly been told that the resolution prohibits a student from meeting with a tutor or job counselor in his dorm room. *Ibid.* Presumably, then, the resolution also forbids a music lesson in the dorm, a form of tutoring. A speech therapist would be excluded, as would an art teacher or drama coach.

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[2] Although at times we have suggested that as-applied challenges should be decided before overbreadth challenges, see *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491 (1985), we have often felt free to do otherwise, see *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569 (1987); *Houston* v. *Hill*, 482 U. S. 451 (1987). Here, the Court has a choice between deciding the general question whether "governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end," *ante*, at 471, and the specific question whether this particular resolution is void because of unconstitutional overbreadth. Surely, the former question is the more sweeping one in terms of constitutional law.

A public university cannot categorically prevent these fully protected expressive activities from occurring in a student's dorm room. The dorm room is the student's residence for the academic term, and a student surely has a right to use this residence for expressive activities that are not inconsistent with the educational mission of the university or with the needs of other dorm residents (the distinction between tuba lessons and classical guitar lessons, or between drawing lessons and stone sculpture lessons, comes immediately to mind). See *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969); cf. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949). It cannot plausibly be asserted that music, art, speech, writing, or other kinds of lessons are inconsistent with the educational mission of the university, or that a categorical prohibition of these activities is the "least-restrictive means" (or is even "narrowly tailored") to protect the interests of other dorm residents. Nor is there any possible basis for believing that in-dorm psychological or vocational counseling is incompatible with the university's objectives or the needs of other residents. Thus, the broad reach of Resolution 66–156 cannot be squared with the dictates of the First Amendment.

More important, the resolution's overbreadth is undoubtedly "substantial" in relation to whatever legitimate scope the resolution may have. See *Houston* v. *Hill*, 482 U. S. 451, 458 (1987); *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 574 (1987). Even assuming that the university may prohibit *all* forms of commercial speech from a student's dorm (a proposition that is by no means obvious under our precedents),[3] the resolution's impermissible restrictions upon fully protected speech amount to a considerable portion of the resolution's potential applica-

[3] For example, it is highly doubtful that the university could prohibit students from inviting to their rooms a representative from a birth-control clinic, from whom the students seek information about services the clinic provides for a fee. Cf. *Bigelow* v. *Virginia*, 421 U. S. 809, 822 (1975).

tions. Because the resolution makes no effort to distinguish between commercial and noncommercial speech, or to narrow its scope to the perceived evil it was intended to address, see *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940), it sweeps within its reach far more protected expression than is tolerable under the First Amendment.

In this respect, the resolution here is equivalent to the one struck down on overbreadth grounds in *Jews for Jesus*, *supra*, a resolution that banned all "First Amendment activities" within the central terminal area of a major urban airport. By prohibiting *all* speech in a dorm room if the speaker receives a fee, the resolution in this case, like the resolution in *Jews for Jesus*, indiscriminately proscribes an entire array of wholly innocuous expressive activity, and for that reason is substantially overbroad. I therefore would hold Resolution 66–156 unconstitutional on its face now, in order to avoid chilling protected speech during the pendency of proceedings on remand.

WEBSTER, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* REPRODUCTIVE HEALTH SERVICES ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88–605. Argued April 26, 1989—Decided July 3, 1989

Appellees, state-employed health professionals and private nonprofit corporations providing abortion services, brought suit in the District Court for declaratory and injunctive relief challenging the constitutionality of a Missouri statute regulating the performance of abortions. The statute, *inter alia:* (1) sets forth "findings" in its preamble that "[t]he life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being," §§ 1.205.1(1), (2), and requires that all state laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Federal Constitution and this Court's precedents, § 1.205.2; (2) specifies that a physician, prior to performing an abortion on any woman whom he has reason to believe is 20 or more weeks pregnant, must ascertain whether the fetus is "viable" by performing "such medical examinations and tests as are necessary to make a finding of [the fetus'] gestational age, weight, and lung maturity," § 188.029; (3) prohibits the use of public employees and facilities to perform or assist abortions not necessary to save the mother's life, §§ 188.210, 188.215; and (4) makes it unlawful to use public funds, employees, or facilities for the purpose of "encouraging or counseling" a woman to have an abortion not necessary to save her life, §§ 188.205, 188.210, 188.215. The District Court struck down each of the above provisions, among others, and enjoined their enforcement. The Court of Appeals affirmed, ruling that the provisions in question violated this Court's decisions in *Roe* v. *Wade*, 410 U. S. 113, and subsequent cases.

Held: The judgment is reversed.

851 F. 2d 1071, reversed.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I, II–A, II–B, and II–C, concluding that:

1. This Court need not pass on the constitutionality of the Missouri statute's preamble. In invalidating the preamble, the Court of Appeals misconceived the meaning of the dictum in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 444, that "a State may not adopt one theory of when life begins to justify its regulation of abor-

tions." That statement means only that a State could not "justify" any abortion regulation otherwise invalid under *Roe* v. *Wade* on the ground that it embodied the State's view about when life begins. The preamble does not by its terms regulate abortions or any other aspect of appellees' medical practice, and § 1.205.2 can be interpreted to do no more than offer protections to unborn children in tort and probate law, which is permissible under *Roe* v. *Wade*, *supra*, at 161–162. This Court has emphasized that *Roe* implies no limitation on a State's authority to make a value judgment favoring childbirth over abortion, *Maher* v. *Roe*, 432 U. S. 464, 474, and the preamble can be read simply to express that sort of value judgment. The extent to which the preamble's language might be used to interpret other state statutes or regulations is something that only the state courts can definitively decide, and, until those courts have applied the preamble to restrict appellees' activities in some concrete way, it is inappropriate for federal courts to address its meaning. *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 460. Pp. 504–507.

2. The restrictions in §§ 188.210 and 188.215 of the Missouri statute on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions do not contravene this Court's abortion decisions. The Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government may not deprive the individual. *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U. S. 189, 196. Thus, in *Maher* v. *Roe*, *supra*; *Poelker* v. *Doe*, 432 U. S. 519; and *Harris* v. *McRae*, 448 U. S. 297, this Court upheld governmental regulations withholding public funds for nontherapeutic abortions but allowing payments for medical services related to childbirth, recognizing that a government's decision to favor childbirth over abortion through the allocation of public funds does not violate *Roe* v. *Wade*. A State may implement that same value judgment through the allocation of other public resources, such as hospitals and medical staff. There is no merit to the claim that *Maher*, *Poelker*, and *McRae* must be distinguished on the grounds that preventing access to a public facility narrows or forecloses the availability of abortion. Just as in those cases, Missouri's decision to use public facilities and employees to encourage childbirth over abortion places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but leaves her with the same choices as if the State had decided not to operate any hospitals at all. The challenged provisions restrict her ability to obtain an abortion only to the extent that she chooses to use a physician affiliated with a public hospital. Also without merit is the assertion that

Maher, *Poelker*, and *McRae* must be distinguished on the ground that, since the evidence shows that all of a public facility's costs in providing abortion services are recouped when the patient pays such that no public funds are expended, the Missouri statute goes beyond expressing a preference for childbirth over abortion by creating an obstacle to the right to choose abortion that cannot stand absent a compelling state interest. Nothing in the Constitution requires States to enter or remain in the abortion business or entitles private physicians and their patients access to public facilities for the performance of abortions. Indeed, if the State does recoup all of its costs in performing abortions and no state subsidy, direct or indirect, is available, it is difficult to see how any procreational choice is burdened by the State's ban on the use of its facilities or employees for performing abortions. The cases in question all support the view that the State need not commit any resources to performing abortions, even if it can turn a profit by doing so. Pp. 507–511.

3. The controversy over § 188.205's prohibition on the use of public funds to encourage or counsel a woman to have a nontherapeutic abortion is moot. The Court of Appeals did not consider § 188.205 separately from §§ 188.210 and 188.215—which respectively prohibit the use of public employees and facilities for such counseling—in holding all three sections unconstitutionally vague and violative of a woman's right to choose an abortion. Missouri has appealed only the invalidation of § 188.205. In light of the State's claim, which this Court accepts for purposes of decision, that § 188.205 is not directed at the primary conduct of physicians or health care providers, but is simply an instruction to the State's fiscal officers not to allocate public funds for abortion counseling, appellees contend that they are not "adversely" affected by the section and therefore that there is no longer a case or controversy before the Court on this question. Since plaintiffs are masters of their complaints even at the appellate stage, and since appellees no longer seek equitable relief on their § 188.205 claim, the Court of Appeals is directed to vacate the District Court's judgment with instructions to dismiss the relevant part of the complaint with prejudice. *Deakins* v. *Monaghan*, 484 U. S. 193, 200. Pp. 511–513.

THE CHIEF JUSTICE, joined by JUSTICE WHITE and JUSTICE KENNEDY, concluded in Parts II–D and III that:

1. Section 188.029 of the Missouri statute—which specifies, in its first sentence, that a physician, before performing an abortion on a woman he has reason to believe is carrying an unborn child of 20 or more weeks gestational age, shall first determine if the unborn child is viable by using that degree of care, skill, and proficiency that is commonly exercised by practitioners in the field; but which then provides, in its second sentence, that, in making the viability determination, the physician shall

perform such medical examinations and tests as are necessary to make a finding of the unborn child's gestational age, weight, and lung maturity—is constitutional, since it permissibly furthers the State's interest in protecting potential human life. Pp. 513–521.

(a) The Court of Appeals committed plain error in reading § 188.029 as requiring that after 20 weeks the specified tests *must* be performed. That section makes sense only if its second sentence is read to require only those tests that are useful in making subsidiary viability findings. Reading the sentence to require the tests *in all circumstances*, including when the physician's reasonable professional judgment indicates that they would be irrelevant to determining viability or even dangerous to the mother and the fetus, would conflict with the first sentence's *requirement* that the physician apply his reasonable professional skill and judgment. It would also be incongruous to read the provision, especially the word "necessary," to require tests irrelevant to the expressed statutory purpose of determining viability. Pp. 514–515.

(b) Section 188.029 is reasonably designed to ensure that abortions are not performed where the fetus is viable. The section's tests are intended to determine viability, the State having chosen viability as the point at which its interest in potential human life must be safeguarded. The section creates what is essentially a presumption of viability at 20 weeks, which the physician, prior to performing an abortion, must rebut with tests—including, if feasible, those for gestational age, fetal weight, and lung capacity—indicating that the fetus is not viable. While the District Court found that uncontradicted medical evidence established that a 20-week fetus is *not* viable, and that 23½ to 24 weeks' gestation is the earliest point at which a reasonable possibility of viability exists, it also found that there may be a 4-week error in estimating gestational age, which supports testing at 20 weeks. Pp. 515–516.

(c) Section 188.029 conflicts with *Roe* v. *Wade* and cases following it. Since the section's tests will undoubtedly show in many cases that the fetus is not viable, the tests will have been performed for what were in fact second-trimester abortions. While *Roe*, 410 U. S., at 162, recognized the State's interest in protecting potential human life as "important and legitimate," it also limited state involvement in second-trimester abortions to protecting maternal health, *id.*, at 164, and allowed States to regulate or proscribe abortions to protect the unborn child only after viability, *id.*, at 165. Since the tests in question regulate the physician's discretion in determining the viability of the fetus, § 188.029 conflicts with language in *Colautti* v. *Franklin*, 439 U. S. 379, 388–389, stating that the viability determination is, and must be, a matter for the responsible attending physician's judgment. And, in light of District Court findings that the tests increase the expenses of abortion, their validity

may also be questioned under *Akron*, 462 U. S., at 434–435, which held that a requirement that second-trimester abortions be performed in hospitals was invalid because it substantially increased the expenses of those procedures. Pp. 516–517.

(d) The doubt cast on the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that *Roe*'s rigid trimester analysis has proved to be unsound in principle and unworkable in practice. In such circumstances, this Court does not refrain from reconsidering prior constitutional rulings, notwithstanding *stare decisis*. *E. g.*, *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528. The *Roe* framework is hardly consistent with the notion of a Constitution like ours that is cast in general terms and usually speaks in general principles. The framework's key elements—trimesters and viability—are not found in the Constitution's text, and, since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine. There is also no reason why the State's compelling interest in protecting potential human life should not extend throughout pregnancy rather than coming into existence only at the point of viability. Thus, the *Roe* trimester framework should be abandoned. Pp. 517–520.

(e) There is no merit to JUSTICE BLACKMUN's contention that the Court should join in a "great issues" debate as to whether the Constitution includes an "unenumerated" general right to privacy as recognized in cases such as *Griswold* v. *Connecticut*, 381 U. S. 479. Unlike *Roe*, *Griswold* did not purport to adopt a whole framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply. The *Roe* framework sought to deal with areas of medical practice traditionally left to the States, and to balance once and for all, by reference only to the calendar, the State's interest in protecting potential human life against the claims of a pregnant woman to decide whether or not to abort. The Court's experience in applying *Roe* in later cases suggests that there is wisdom in not necessarily attempting to elaborate the differences between a "fundamental right" to an abortion, *Akron*, *supra*, at 420, n. 1, a "limited fundamental constitutional right," *post*, at 555, or a liberty interest protected by the Due Process Clause. Moreover, although this decision will undoubtedly allow more governmental regulation of abortion than was permissible before, the goal of constitutional adjudication is not to remove inexorably "politically devisive" issues from the ambit of the legislative process, but is, rather, to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not. Furthermore, the suggestion that legislative bodies, in a Na-

tion where more than half the population is female, will treat this decision as an invitation to enact abortion laws reminiscent of the dark ages misreads the decision and does scant justice to those who serve in such bodies and the people who elect them. Pp. 520–521.

2. This case affords no occasion to disturb *Roe*'s holding that a Texas statute which criminalized *all* nontherapeutic abortions unconstitutionally infringed the right to an abortion derived from the Due Process Clause. *Roe* is distinguishable on its facts, since Missouri has determined that viability is the point at which its interest in potential human life must be safeguarded. P. 521.

JUSTICE O'CONNOR, agreeing that it was plain error for the Court of Appeals to interpret the second sentence of § 188.029 as meaning that doctors *must* perform tests to find gestational age, fetal weight, and lung maturity, concluded that the section was constitutional as properly interpreted by the plurality, and that the plurality should therefore not have proceeded to reconsider *Roe* v. *Wade*. This Court refrains from deciding constitutional questions where there is no need to do so, and generally does not formulate a consitutional rule broader than the precise facts to which it is to be applied. *Ashwander* v. *TVA*, 297 U. S. 288, 346, 347. Since appellees did not appeal the District Court's ruling that the first sentence of § 188.029 is constitutional, there is no dispute between the parties over the presumption of viability at 20 weeks created by that first sentence. Moreover, as properly interpreted by the plurality, the section's second sentence does nothing more than delineate means by which the unchallenged 20-week presumption may be overcome if those means are useful in determining viability and can be prudently employed. As so interpreted, the viability testing requirements do not conflict with any of the Court's abortion decisions. As the plurality recognizes, under its interpretation of § 188.029's second sentence, the viability testing requirements promote the State's interest in potential life. This Court has recognized that a State may promote that interest when viability is possible. *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 770–771. Similarly, the basis for reliance by the lower courts on *Colautti* v. *Franklin*, 439 U. S. 379, 388–389, disappears when § 188.029 is properly interpreted to require only *subsidiary* viability findings, since the State has not attempted to substitute its judgment for the physician's ascertainment of viability, which therefore remains "the critical point." Nor does the marginal increase in the cost of an abortion created by § 188.029's viability testing provision, as interpreted, conflict with *Akron* v. *Akron Center for Reproductive Health*, 462 U. S. 416, 434–439, since, here, such costs do not place a "heavy, and unnecessary burden" on a woman's abortion decision, whereas the statutory requirement in *Akron*, which related to

previablity abortions, more than doubled a woman's costs. Moreover, the statutory requirement in Akron involved second-trimester abortions generally; § 188.029 concerns only tests and examinations to determine viability when viability is possible. The State's compelling interest in potential life postviability renders its interest in determining the critical point of viability equally compelling. *Thornburgh*, *supra*, at 770–771. When the constitutional invalidity of a State's abortion statute actually turns upon the constitutional validity of *Roe*, there will be time enough to reexamine *Roe*, and to do so carefully. Pp. 525–531.

JUSTICE SCALIA would reconsider and explicitly overrule *Roe* v. *Wade*. Avoiding the *Roe* question by deciding this case in as narrow a manner as possible is not required by precedent and not justified by policy. To do so is needlessly to prolong this Court's involvement in a field where the answers to the central questions are political rather than juridical, and thus to make the Court the object of the sort of organized pressure that political institutions in a democracy ought to receive. It is particularly perverse to decide this case as narrowly as possible in order to avoid reading the inexpressibly "broader-than-was-required-by-the-precise-facts" structure established by *Roe* v. *Wade*. The question of *Roe*'s validity is presented here, inasmuch as § 188.029 constitutes a legislative imposition on the judgment of the physician concerning the point of viability and increases the cost of an abortion. It does palpable harm, if the States can and would eliminate largely unrestricted abortion, skillfully to refrain from telling them so. Pp. 532–537.

REHNQUIST, C. J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Part II–C, the opinion of the Court with respect to Parts I, II–A, and II–B, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Parts II–D and III, in which WHITE and KENNEDY, JJ., joined. O'CONNOR, J., *post*, p. 522, and SCALIA, J., *post*, p. 532, filed opinions concurring in part and concurring in the judgment. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 537. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 560.

William L. Webster, Attorney General of Missouri, *pro se*, argued the cause for appellants. With him on the briefs were *Michael L. Boicourt* and *Jerry L. Short*, Assistant Attorneys General.

Charles Fried argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Acting*

Solicitor General Bryson, Assistant Attorney General Bolton, Deputy Solicitor General Merrill, Roger Clegg, Steven R. Valentine, and *Michael K. Kellogg.*

Frank Susman argued the cause for appellees. With him on the brief were *Roger K. Evans, Dara Klassel, Barbara E. Otten, Thomas M. Blumenthal,* and *Janet Benshoof.**

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*Briefs of *amici curiae* urging reversal were filed for Alabama Lawyers for Unborn Children, Inc., by *John J. Coleman III* and *Thomas E. Maxwell;* for the American Association of Prolife Obstetricians and Gynecologists et al. by *Dolores Horan* and *Paige Comstock Cunningham;* for the American Family Association, Inc., by *Peggy M. Coleman;* for the American Life League, Inc., by *Marion Edwyn Harrison* and *John S. Baker, Jr.;* for the Catholic Health Association of the United States by *J. Roger Edgar, David M. Harris, Kathleen M. Boozang, J. Stuart Showalter,* and *Peter E. Campbell;* for the Catholic Lawyers Guild of the Archdiocese of Boston, Inc., by *Calum B. Anderson* and *Leonard F. Zandrow, Jr.;* for the Center for Judicial Studies et al. by *Jules B. Gerard;* for Covenant House et al. by *Gregory A. Loken;* for Focus On The Family et al. by *H. Robert Showers;* for the Holy Orthodox Church by *James George Jatras;* for the Knights of Columbus by *Robert J. Cynkar* and *Brendan V. Sullivan, Jr.;* for the Lutheran Church-Missouri Synod et al. by *Philip E. Draheim;* for the Missouri Catholic Conference by *David M. Harris, J. Roger Edgar, Bernard C. Huger, Kathleen M. Boozang,* and *Louis C. DeFeo, Jr.;* for the National Legal Foundation by *Douglas W. Davis* and *Robert K. Skolrood;* for Right to Life Advocates, Inc., by *Richard W. Schmude* and *Rory R. Olsen;* for the Rutherford Institute et al. by *James J. Knicely, John W. Whitehead, Thomas W. Strahan, David E. Morris, William B. Hollberg, Amy Dougherty, Randall A. Pentiuk, William Bonner, Larry L. Crain,* and *W. Charles Bundren;* for the Southern Center for Law and Ethics by *Albert L. Jordan;* for the Southwest Life and Law Center, Inc., by *David Burnell Smith;* for the United States Catholic Conference by *Mark E. Chopko* and *Phillip H. Harris;* for 127 Members of the Missouri General Assembly by *Timothy Belz, Lynn D. Wardle,* and *Richard G. Wilkins;* and for James Joseph Lynch, Jr., by Mr. Lynch, *pro se.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Burt Neuborne, Janet Benshoof, Rachael N. Pine,* and *Lynn M. Paltrow;* for the American Jewish Congress et al. by *Martha L. Minow;* for the American Library Association et al. by *Bruce J. Ennis* and *Mark D. Schneider;* for the American Medical Association et al. by *Jack R. Bierig, Carter G. Phillips, Elizabeth H. Esty, Stephan*

CHIEF JUSTICE REHNQUIST announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, and II–C, and an opinion with respect

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E. Lawton, *Ann E. Allen*, *Laurie R. Rockett*, and *Joel I. Klein;* for the American Psychological Association by *Donald N. Bersoff;* for the American Public Health Association et al. by *John H. Hall* and *Nadine Taub;* for Americans for Democratic Action et al. by *Marsha S. Berzon;* for Americans United for Separation of Church and State by *Lee Boothby*, *Robert W. Nixon*, and *Robert J. Lipshutz;* for the Association of Reproductive Health Professionals et al. by *Colleen K. Connell* and *Dorothy B. Zimbrakos;* for Bioethicists for Privacy by *George J. Annas;* for Catholics for a Free Choice et al. by *Patricia Hennessey;* for the Center for Population Options et al. by *John H. Henn* and *Thomas Asher;* for the Committee on Civil Rights of the Bar of the City of New York et al. by *Jonathan Lang*, *Diane S. Wilner*, *Arthur S. Leonard*, *Audrey S. Feinberg*, and *Janice Goodman;* for 22 International Women's Health Organizations by *Kathryn Kolbert;* for the American Nurses' Association et al. by *E. Calvin Golumbic;* for the National Coalition Against Domestic Violence by *David A. Strauss;* for the National Family Planning and Reproductive Health Association by *James L. Feldesman*, *Jeffrey K. Stith*, and *Thomas E. Zemaitis;* for the National Association of Public Hospitals by *Alan K. Parver* and *Phyllis E. Bernard;* for Population-Environment Balance et al. by *Dina R. Lassow;* for 281 American Historians by *Sylvia A. Law;* and for 2,887 Women Who Have Had Abortions et al. by *Sarah E. Burns*.

Briefs of *amici curiae* were filed for the State of California et al. by *Robert Abrams*, Attorney General of New York, *O. Peter Sherwood*, Solicitor General, and *Suzanne M. Lynn* and *Marla Tepper*, Assistant Attorneys General, *James M. Shannon*, Attorney General of Massachusetts, and *Suzanne E. Durrell* and *Madelyn F. Wessel*, Assistant Attorneys General, *Elizabeth Holtzman*, *pro se*, *Barbara D. Underwood*, *John K. Van de Kamp*, Attorney General of California, *Duane Woodard*, Attorney General of Colorado, *Jim Mattox*, Attorney General of Texas, and *Jeffrey L. Amestoy*, Attorney General of Vermont; for the State of Louisiana et al. by *William J. Guste, Jr.*, Attorney General of Louisiana, *Jo Ann P. Levert*, Assistant Attorney General, and *Thomas A. Rayer*, *Robert K. Corbin*, Attorney General of Arizona, *Jim Jones*, Attorney General of Idaho, and *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania; for Agudath Israel of America by *Steven D. Prager;* for the American Academy of Medical Ethics by *James Bopp, Jr.;* for the California National Organization for Women et al. by *Kathryn A. Sure;* for American Collegians for Life, Inc., et al. by *Robert A. Destro;* for the Canadian Abortion Rights Action League et al. by

to Parts II–D and III, in which JUSTICE WHITE and JUSTICE KENNEDY join.

This appeal concerns the constitutionality of a Missouri statute regulating the performance of abortions. The United States Court of Appeals for the Eighth Circuit struck down several provisions of the statute on the ground that they violated this Court's decision in *Roe* v. *Wade*, 410 U. S. 113 (1973), and cases following it. We noted probable jurisdiction, 488 U. S. 1003 (1989), and now reverse.

Estelle Rogers; for the Association for Public Justice et al. by *Joseph W. Dellapenna;* for Birthright, Inc., by *Joseph I. McCullough, Jr.;* for Catholics United for Life et al. by *Walter M. Weber, Michael J. Woodruff, Charles E. Rice,* and *Michael J. Laird;* for Christian Advocates Serving Evangelism by *Theodore H. Amshoff, Jr.;* for Doctors for Life et al. by *Andrew F. Puzder* and *Kenneth C. Jones;* for Feminists For Life of America et al. by *Christine Smith Torre;* for Free Speech Advocates by *Thomas Patrick Monaghan;* for Human Life International by *Robert L. Sassone;* for the International Right to Life Federation by *John J. Potts;* for the National Association of Women Lawyers et al. by *Nicholas DeB. Katzenbach, Leona Beane,* and *Estelle H. Rogers;* for the National Council of Negro Women, Inc., et al. by *Rhonda Copelon;* for the National Organization for Women by *John S. L. Katz;* for the National Right to Life Committee, Inc., by *James Bopp, Jr.;* for the New England Christian Action Council, Inc., by *Philip D. Moran;* for the Right to Life League of Southern California, Inc., by *Robert L. Sassone;* for 77 Organizations Committed to Women's Equality by *Judith L. Lichtman, Donna R. Lenhoff, Marcia Greenberger, Stephanie Ridder,* and *Wendy Webster Williams;* for Certain Members of the Congress of the United States by *Burke Marshall* and *Norman Redlich;* for Congressman Christopher H. Smith et al. by *Albert P. Blaustein, Edward R. Grant,* and *Ann-Louise Lohr;* for 608 State Legislators by *Herma Hill Kay, James J. Brosnahan,* and *Jack W. Londen;* for Certain Members of the General Assembly of the Commonwealth of Pennsylvania by *William Bentley Ball, Philip J. Murren,* and *Maura K. Quinlan;* for Certain American State Legislators by *Paul Benjamin Linton* and *Clarke D. Forsythe;* for A Group of American Law Professors by *Norman Redlich;* for 167 Distinguished Scientists and Physicians by *Jay Kelly Wright;* for Edward Allen by *Robert L. Sassone;* for Larry Joyce by *Thomas P. Joyce;* for Paul Marx by *Robert L. Sassone;* for Bernard N. Nathanson by Mr. Sassone; and for Austin Vaughn et al. by Mr. Sassone.

I

In June 1986, the Governor of Missouri signed into law Missouri Senate Committee Substitute for House Bill No. 1596 (hereinafter Act or statute), which amended existing state law concerning unborn children and abortions.[1]

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[1] After *Roe* v. *Wade*, the State of Missouri's then-existing abortion regulations, see Mo. Rev. Stat. §§ 559.100, 542.380, and 563.300 (1969), were declared unconstitutional by a three-judge federal court. This Court summarily affirmed that judgment. *Danforth* v. *Rodgers*, 414 U. S. 1035 (1973). Those statutes, like the Texas statute at issue in *Roe*, made it a crime to perform an abortion except when the mother's life was at stake. 410 U. S., at 117–118, and n. 2.

In June 1974, the State enacted House Committee Substitute for House Bill No. 1211, which imposed new regulations on abortions during all stages of pregnancy. Among other things, the 1974 Act defined "viability," § 2(2); required the written consent of the woman prior to an abortion during the first 12 weeks of pregnancy, § 3(2); required the written consent of the woman's spouse prior to an elective abortion during the first 12 weeks of pregnancy, § 3(3); required the written consent of one parent if the woman was under 18 and unmarried prior to an elective abortion during the first 12 weeks of pregnancy, § 3(4); required a physician performing an abortion to exercise professional care to "preserve the life and health of the fetus" regardless of the stage of pregnancy and, if he should fail that duty, deemed him guilty of manslaughter and made him liable for damages, § 6(1); prohibited the use of saline amniocentesis, as a method of abortion, after the first 12 weeks of pregnancy, § 9; and required certain recordkeeping for health facilities and physicians performing abortions, §§ 10, 11. In *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52 (1976), the Court upheld the definition of viability, *id.*, at 63–65, the consent provision in § 3(2), *id.*, at 65–67, and the recordkeeping requirements. *Id.*, at 79–81. It struck down the spousal consent provision, *id.*, at 67–72, the parental consent provision, *id.*, at 72–75, the prohibition on abortions by amniocentesis, *id.*, at 75–79, and the requirement that physicians exercise professional care to preserve the life of the fetus regardless of the stage of pregnancy. *Id.*, at 81–84.

In 1979, Missouri passed legislation that, *inter alia*, required abortions after 12 weeks to be performed in a hospital, Mo. Rev. Stat. § 188.025 (Supp. 1979); required a pathology report for each abortion performed, § 188.047; required the presence of a second physician during abortions performed after viability, § 188.030.3; and required minors to secure paren-

The Act consisted of 20 provisions, 5 of which are now before the Court. The first provision, or preamble, contains "findings" by the state legislature that "[t]he life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being." Mo. Rev. Stat. §§ 1.205.1(1), (2) (1986). The Act further requires that all Missouri laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Federal Constitution and this Court's precedents. § 1.205.2. Among its other provisions, the Act requires that, prior to performing an abortion on any woman whom a physician has reason to believe is 20 or more weeks pregnant, the physician ascertain whether the fetus is viable by performing "such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child." § 188.029. The Act also prohibits the use of public employees and facilities to perform or assist abortions not necessary to save the mother's life, and it prohibits the use of public funds, employees, or facilities for the purpose of "encouraging or counseling" a woman to have an abortion not necessary to save her life. §§ 188.205, 188.210, 188.215.

In July 1986, five health professionals employed by the State and two nonprofit corporations brought this class action in the United States District Court for the Western District of Missouri to challenge the constitutionality of the Missouri statute. Plaintiffs, appellees in this Court, sought declaratory and injunctive relief on the ground that certain statutory provisions violated the First, Fourth, Ninth, and Fourteenth Amendments to the Federal Constitution. App. A9. They asserted violations of various rights, including the "privacy

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tal consent or consent from the juvenile court for an abortion, § 188.028. In *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476 (1983), the Court struck down the second-trimester hospitalization requirement, *id.*, at 481–482, but upheld the other provisions described above. *Id.*, at 494.

rights of pregnant women seeking abortions"; the "woman's right to an abortion"; the "righ[t] to privacy in the physician-patient relationship"; the physician's "righ[t] to practice medicine"; the pregnant woman's "right to life due to inherent risks involved in childbirth"; and the woman's right to "receive . . . adequate medical advice and treatment" concerning abortions. *Id.*, at A17–A19.

Plaintiffs filed this suit "on their own behalf and on behalf of the entire class consisting of facilities and Missouri licensed physicians or other health care professionals offering abortion services or pregnancy counseling and on behalf of the entire class of pregnant females seeking abortion services or pregnancy counseling within the State of Missouri." *Id.*, at A13. The two nonprofit corporations are Reproductive Health Services, which offers family planning and gynecological services to the public, including abortion services up to 22 weeks "gestational age,"[2] and Planned Parenthood of Kansas City, which provides abortion services up to 14 weeks gestational age. *Id.*, at A9–A10. The individual plaintiffs are three physicians, one nurse, and a social worker. All are "public employees" at "public facilities" in Missouri, and they are paid for their services with "public funds," as those terms are defined by § 188.200. The individual plaintiffs, within the scope of their public employment, encourage and counsel pregnant women to have nontherapeutic abortions. Two of the physicians perform abortions. App. A54–A55.

Several weeks after the complaint was filed, the District Court temporarily restrained enforcement of several provisions of the Act. Following a 3-day trial in December 1986, the District Court declared seven provisions of the Act unconstitutional and enjoined their enforcement. 662 F. Supp. 407 (WD Mo. 1987). These provisions included the preamble, § 1.205; the "informed consent" provision, which re-

[2] The Act defines "gestational age" as the "length of pregnancy as measured from the first day of the woman's last menstrual period." Mo. Rev. Stat. § 188.015(4) (1986).

quired physicians to inform the pregnant woman of certain facts before performing an abortion, § 188.039; the requirement that post-16-week abortions be performed only in hospitals, § 188.025; the mandated tests to determine viability, § 188.029; and the prohibition on the use of public funds, employees, and facilities to perform or assist nontherapeutic abortions, and the restrictions on the use of public funds, employees, and facilities to encourage or counsel women to have such abortions, §§ 188.205, 188.210, 188.215. *Id.*, at 430.

The Court of Appeals for the Eighth Circuit affirmed, with one exception not relevant to this appeal. 851 F. 2d 1071 (1988). The Court of Appeals determined that Missouri's declaration that life begins at conception was "simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations." *Id.*, at 1076. Relying on *Colautti* v. *Franklin*, 439 U. S. 379, 388–389 (1979), it further held that the requirement that physicians perform viability tests was an unconstitutional legislative intrusion on a matter of medical skill and judgment. 851 F. 2d, at 1074–1075. The Court of Appeals invalidated Missouri's prohibition on the use of public facilities and employees to perform or assist abortions not necessary to save the mother's life. *Id.*, at 1081–1083. It distinguished our decisions in *Harris* v. *McRae*, 448 U. S. 297 (1980), and *Maher* v. *Roe*, 432 U. S. 464 (1977), on the ground that "'[t]here is a fundamental difference between providing direct funding to effect the abortion decision and allowing staff physicians to perform abortions at an existing publicly owned hospital.'" 851 F. 2d, at 1081, quoting *Nyberg* v. *City of Virginia*, 667 F. 2d 754, 758 (CA8 1982), appeal dism'd, 462 U. S. 1125 (1983). The Court of Appeals struck down the provision prohibiting the use of public funds for "encouraging or counseling" women to have nontherapeutic abortions, for the reason that this provision was both overly vague and inconsistent with the right to an abortion enunciated in *Roe* v. *Wade*. 851 F. 2d, at 1077–1080. The court also invalidated the hospitaliza-

tion requirement for 16-week abortions, *id.*, at 1073–1074, and the prohibition on the use of public employees and facilities for abortion counseling, *id.*, at 1077–1080, but the State has not appealed those parts of the judgment below. See Juris. Statement I–II.[3]

II

Decision of this case requires us to address four sections of the Missouri Act: (a) the preamble; (b) the prohibition on the use of public facilities or employees to perform abortions; (c) the prohibition on public funding of abortion counseling; and (d) the requirement that physicians conduct viability tests prior to performing abortions. We address these *seriatim*.

A

The Act's preamble, as noted, sets forth "findings" by the Missouri Legislature that "[t]he life of each human being begins at conception," and that "[u]nborn children have protectable interests in life, health, and well-being." Mo. Rev. Stat. §§ 1.205.1(1), (2) (1986). The Act then mandates that state laws be interpreted to provide unborn children with "all the rights, privileges, and immunities available to other persons, citizens, and residents of this state," subject to the Constitution and this Court's precedents. § 1.205.2.[4] In in-

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[3] The State did not appeal the District Court's invalidation of the Act's "informed consent" provision to the Court of Appeals, 851 F. 2d, at 1073, n. 2, and it is not before us.

[4] Section 1.205 provides in full:

"1. The general assembly of this state finds that:

"(1) The life of each human being begins at conception;

"(2) Unborn children have protectable interests in life, health, and well-being;

"(3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.

"2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the

validating the preamble, the Court of Appeals relied on this Court's dictum that "'a State may not adopt one theory of when life begins to justify its regulation of abortions.'" 851 F. 2d, at 1075–1076, quoting *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 444 (1983), in turn citing *Roe* v. *Wade*, 410 U. S., at 159–162. It rejected Missouri's claim that the preamble was "abortion-neutral," and "merely determine[d] when life begins in a nonabortion context, a traditional state prerogative." 851 F. 2d, at 1076. The court thought that "[t]he only plausible inference" from the fact that "every remaining section of the bill save one regulates the performance of abortions" was that "the state intended its abortion regulations to be understood against the backdrop of its theory of life." *Ibid.*[5]

The State contends that the preamble itself is precatory and imposes no substantive restrictions on abortions, and that appellees therefore do not have standing to challenge it. Brief for Appellants 21–24. Appellees, on the other hand, insist that the preamble is an operative part of the Act intended to guide the interpretation of other provisions of the Act. Brief for Appellees 19–23. They maintain, for example, that the preamble's definition of life may prevent physi-

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United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

"3. As used in this section, the term 'unborn children' or 'unborn child' shall include all unborn child *[sic]* or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.

"4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care."

[5]Judge Arnold dissented from this part of the Court of Appeals' decision, arguing that Missouri's declaration of when life begins should be upheld "insofar as it relates to subjects other than abortion," such as "creating causes of action against persons other than the mother" for wrongful death or extending the protection of the criminal law to fetuses. 851 F. 2d, at 1085 (opinion concurring in part and dissenting in part).

cians in public hospitals from dispensing certain forms of contraceptives, such as the intrauterine device. *Id.*, at 22.

In our view, the Court of Appeals misconceived the meaning of the *Akron* dictum, which was only that a State could not "justify" an abortion regulation otherwise invalid under *Roe* v. *Wade* on the ground that it embodied the State's view about when life begins. Certainly the preamble does not by its terms regulate abortion or any other aspect of appellees' medical practice. The Court has emphasized that *Roe* v. *Wade* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion." *Maher* v. *Roe*, 432 U. S., at 474. The preamble can be read simply to express that sort of value judgment.

We think the extent to which the preamble's language might be used to interpret other state statutes or regulations is something that only the courts of Missouri can definitively decide. State law has offered protections to unborn children in tort and probate law, see *Roe* v. *Wade*, *supra*, at 161–162, and § 1.205.2 can be interpreted to do no more than that. What we have, then, is much the same situation that the Court confronted in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945). As in that case:

> "We are thus invited to pass upon the constitutional validity of a state statute which has not yet been applied or threatened to be applied by the state courts to petitioners or others in the manner anticipated. Lacking any authoritative construction of the statute by the state courts, without which no constitutional question arises, and lacking the authority to give such a controlling construction ourselves, and with a record which presents no concrete set of facts to which the statute is to be applied, the case is plainly not one to be disposed of by the declaratory judgment procedure." *Id.*, at 460.

It will be time enough for federal courts to address the meaning of the preamble should it be applied to restrict the activities of appellees in some concrete way. Until then, this

Court "is not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 409 (1900). See also *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 473 (1982).[6] We therefore need not pass on the constitutionality of the Act's preamble.

B

Section 188.210 provides that "[i]t shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother," while § 188.215 makes it "unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother."[7] The Court of Appeals held that these provisions contravened this Court's abortion decisions. 851 F. 2d, at 1082–1083. We take the contrary view.

As we said earlier this Term in *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U. S. 189, 196 (1989): "[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." In *Maher* v. *Roe*, *supra*, the Court upheld a Connecticut welfare regulation under which Medicaid recipients received payments for medical services re-

[6] Appellees also claim that the legislature's preamble violates the Missouri Constitution. Brief for Appellees 23–26. But the considerations discussed in the text make it equally inappropriate for a federal court to pass upon this claim before the state courts have interpreted the statute.

[7] The statute defines "public employee" to mean "any person employed by this state or any agency or political subdivision thereof." Mo. Rev. Stat. § 188.200(1) (1986). "Public facility" is defined as "any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivisions thereof." § 188.200(2).

lated to childbirth, but not for nontherapeutic abortions. The Court rejected the claim that this unequal subsidization of childbirth and abortion was impermissible under *Roe* v. *Wade*. As the Court put it:

> "The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation." 432 U. S., at 474.

Relying on *Maher*, the Court in *Poelker* v. *Doe*, 432 U. S. 519, 521 (1977), held that the city of St. Louis committed "no constitutional violation . . . in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions."

More recently, in *Harris* v. *McRae*, 448 U. S. 297 (1980), the Court upheld "the most restrictive version of the Hyde Amendment," *id.*, at 325, n. 27, which withheld from States federal funds under the Medicaid program to reimburse the costs of abortions, "'except where the life of the mother would be endangered if the fetus were carried to term.'" *Ibid.* (quoting Pub. L. 94–439, § 209, 90 Stat. 1434). As in *Maher* and *Poelker*, the Court required only a showing that Congress' authorization of "reimbursement for medically necessary services generally, but not for certain medically neces-

sary abortions" was rationally related to the legitimate governmental goal of encouraging childbirth. 448 U. S., at 325.

The Court of Appeals distinguished these cases on the ground that "[t]o prevent access to a public facility does more than demonstrate a political choice in favor of childbirth; it clearly narrows and in some cases forecloses the availability of abortion to women." 851 F. 2d, at 1081. The court reasoned that the ban on the use of public facilities "could prevent a woman's chosen doctor from performing an abortion because of his unprivileged status at other hospitals or because a private hospital adopted a similar anti-abortion stance." *Ibid.* It also thought that "[s]uch a rule could increase the cost of obtaining an abortion and delay the timing of it as well." *Ibid.*

We think that this analysis is much like that which we rejected in *Maher*, *Poelker*, and *McRae*. As in those cases, the State's decision here to use public facilities and staff to encourage childbirth over abortion "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." *McRae*, 448 U. S., at 315. Just as Congress' refusal to fund abortions in *McRae* left "an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all," *id.*, at 317, Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all. The challenged provisions only restrict a woman's ability to obtain an abortion to the extent that she chooses to use a physician affiliated with a public hospital. This circumstance is more easily remedied, and thus considerably less burdensome, than indigency, which "may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions" without public funding. *Maher*, 432 U. S., at 474. Having held that the State's refusal to fund abortions does not violate *Roe* v. *Wade*, it strains logic to reach a contrary result for the use

of public facilities and employees. If the State may "make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds," *Maher*, *supra*, at 474, surely it may do so through the allocation of other public resources, such as hospitals and medical staff.

The Court of Appeals sought to distinguish our cases on the additional ground that "[t]he evidence here showed that all of the public facility's costs in providing abortion services are recouped when the patient pays." 851 F. 2d, at 1083. Absent any expenditure of public funds, the court thought that Missouri was "expressing" more than "its preference for childbirth over abortions," but rather was creating an "obstacle to exercise of the right to choose an abortion [that could not] stand absent a compelling state interest." *Ibid.* We disagree.

"Constitutional concerns are greatest," we said in *Maher*, *supra*, at 476, "when the State attempts to impose its will by the force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." Nothing in the Constitution requires States to enter or remain in the business of performing abortions. Nor, as appellees suggest, do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions. Brief for Appellees 46–47. Indeed, if the State does recoup all of its costs in performing abortions, and no state subsidy, direct or indirect, is available, it is difficult to see how any procreational choice is burdened by the State's ban on the use of its facilities or employees for performing abortions.[8]

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[8] A different analysis might apply if a particular State had socialized medicine and all of its hospitals and physicians were publicly funded. This case might also be different if the State barred doctors who performed abortions in private facilities from the use of public facilities for any purpose. See *Harris* v. *McRae*, 448 U. S. 297, 317, n. 19 (1980).

Maher, *Poelker*, and *McRae* all support the view that the State need not commit any resources to facilitating abortions, even if it can turn a profit by doing so. In *Poelker*, the suit was filed by an indigent who could not afford to pay for an abortion, but the ban on the performance of nontherapeutic abortions in city-owned hospitals applied whether or not the pregnant woman could pay. 432 U. S., at 520; *id.*, at 524 (BRENNAN, J., dissenting).[9] The Court emphasized that the mayor's decision to prohibit abortions in city hospitals was "subject to public debate and approval or disapproval at the polls," and that "the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth as St. Louis has done." *Id.*, at 521. Thus we uphold the Act's restrictions on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions.

C

The Missouri Act contains three provisions relating to "encouraging or counseling a woman to have an abortion not necessary to save her life." Section 188.205 states that no public funds can be used for this purpose; § 188.210 states that public employees cannot, within the scope of their employment, engage in such speech; and § 188.215 forbids such speech in public facilities. The Court of Appeals did not consider § 188.205 separately from §§ 188.210 and 188.215. It held that all three of these provisions were unconstitutionally vague, and that "the ban on using public funds, employees, and facilities to encourage or counsel a woman to have an abortion is an unacceptable infringement of the woman's fourteenth amendment right to choose an abortion after receiving

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[9] The suit in *Poelker* was brought by the plaintiff "on her own behalf and on behalf of the entire class of pregnant women residents of the City of St. Louis, Missouri, desiring to utilize the personnel, facilities and services of the general public hospitals within the City of St. Louis for the termination of pregnancies." *Doe* v. *Poelker*, 497 F. 2d 1063, 1065 (CA8 1974).

the medical information necessary to exercise the right knowingly and intelligently." 851 F. 2d, at 1079.[10]

Missouri has chosen only to appeal the Court of Appeals' invalidation of the public funding provision, § 188.205. See Juris. Statement I–II. A threshold question is whether this provision reaches primary conduct, or whether it is simply an instruction to the State's fiscal officers not to allocate funds for abortion counseling. We accept, for purposes of decision, the State's claim that § 188.205 "is not directed at the conduct of any physician or health care provider, private or public," but "is directed solely at those persons responsible for expending public funds." Brief for Appellants 43.[11]

Appellees contend that they are not "adversely" affected under the State's interpretation of § 188.205, and therefore that there is no longer a case or controversy before us on this question. Brief for Appellees 31–32. Plaintiffs are masters of their complaints and remain so at the appellate stage of a litigation. See *Caterpillar Inc.* v. *Williams*, 482 U. S. 386, 398–399 (1987). A majority of the Court agrees with appellees that the controversy over § 188.205 is now moot, because appellees' argument amounts to a decision to no longer seek a declaratory judgment that § 188.205 is unconstitutional and accompanying declarative relief. See *Deakins* v. *Monaghan*, 484 U. S. 193, 199–201 (1988); *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39–40 (1950). We accordingly direct the Court of Appeals to vacate the judgment of the District Court

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[10] In a separate opinion, Judge Arnold argued that Missouri's prohibition violated the First Amendment because it "sharply discriminate[s] between kinds of speech on the basis of their viewpoint: a physician, for example, could discourage an abortion, or counsel against it, while in a public facility, but he or she could not encourage or counsel in favor of it." 851 F. 2d, at 1085.

[11] While the Court of Appeals did not address this issue, the District Court thought that the definition of "public funds" in Mo. Rev. Stat. § 188.200 (1986) "certainly is broad enough to make 'encouraging or counseling' unlawful for anyone who is paid from" public funds as defined in § 188.200. 662 F. Supp. 407, 426 (WD Mo. 1987).

with instructions to dismiss the relevant part of the complaint. *Deakins*, 484 U. S., at 200. "Because this [dispute] was rendered moot in part by [appellees'] willingness permanently to withdraw their equitable claims from their federal action, a dismissal with prejudice is indicated." *Ibid.*

D

Section 188.029 of the Missouri Act provides:

> "Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother."[12]

As with the preamble, the parties disagree over the meaning of this statutory provision. The State emphasizes the language of the first sentence, which speaks in terms of the physician's determination of viability being made by the standards of ordinary skill in the medical profession. Brief for Appellants 32–35. Appellees stress the language of the second sentence, which prescribes such "tests as are necessary" to make a finding of gestational age, fetal weight, and lung maturity. Brief for Appellees 26–30.

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[12] The Act's penalty provision provides that "[a]ny person who contrary to the provisions of sections 188.010 to 188.085 knowingly performs . . . any abortion or knowingly fails to perform any action required by [these] sections . . . shall be guilty of a class A misdemeanor." Mo. Rev. Stat. § 188.075 (1986).

The Court of Appeals read § 188.029 as requiring that after 20 weeks "doctors *must* perform tests to find gestational age, fetal weight and lung maturity." 851 F. 2d, at 1075, n. 5. The court indicated that the tests needed to determine fetal weight at 20 weeks are "unreliable and inaccurate" and would add $125 to $250 to the cost of an abortion. *Ibid.* It also stated that "amniocentesis, the only method available to determine lung maturity, is contrary to accepted medical practice until 28–30 weeks of gestation, expensive, and imposes significant health risks for both the pregnant woman and the fetus." *Ibid.*

We must first determine the meaning of § 188.029 under Missouri law. Our usual practice is to defer to the lower court's construction of a state statute, but we believe the Court of Appeals has "fallen into plain error" in this case. *Frisby* v. *Schultz*, 487 U. S. 474, 483 (1988); see *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 500, n. 9 (1985). "'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Philbrook* v. *Glodgett*, 421 U. S. 707, 713 (1975), quoting *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122 (1849). See *Chemehuevi Tribe of Indians* v. *FPC*, 420 U. S. 395, 402–403 (1975); *Kokoszka* v. *Belford*, 417 U. S. 642, 650 (1974). The Court of Appeals' interpretation also runs "afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby*, *supra*, at 483.

We think the viability-testing provision makes sense only if the second sentence is read to require only those tests that are useful to making subsidiary findings as to viability. If we construe this provision to require a physician to perform those tests needed to make the three specified findings *in all circumstances*, including when the physician's reasonable professional judgment indicates that the tests would be irrelevant to determining viability or even dangerous to the mother and the fetus, the second sentence of § 188.029 would

conflict with the first sentence's *requirement* that a physician apply his reasonable professional skill and judgment. It would also be incongruous to read this provision, especially the word "necessary,"[13] to require the performance of tests irrelevant to the expressed statutory purpose of determining viability. It thus seems clear to us that the Court of Appeals' construction of § 188.029 violates well-accepted canons of statutory interpretation used in the Missouri courts, see *State ex rel. Stern Brothers & Co.* v. *Stilley*, 337 S. W. 2d 934, 939 (Mo. 1960) ("The basic rule of statutory construction is to first seek the legislative intention, and to effectuate it if possible, and the law favors constructions which harmonize with reason, and which tend to avoid unjust, absurd, unreasonable or confiscatory results, or oppression"); *Bell* v. *Mid-Century Ins. Co.*, 750 S. W. 2d 708, 710 (Mo. App. 1988) ("Interpreting the phrase literally would produce an absurd result, which the Legislature is strongly presumed not to have intended"), which JUSTICE BLACKMUN ignores. *Post*, at 545–546.

The viability-testing provision of the Missouri Act is concerned with promoting the State's interest in potential human life rather than in maternal health. Section 188.029 creates what is essentially a presumption of viability at 20 weeks, which the physician must rebut with tests indicating that the fetus is not viable prior to performing an abortion. It also directs the physician's determination as to viability by specifying consideration, if feasible, of gestational age, fetal weight, and lung capacity. The District Court found that "the medical evidence is uncontradicted that a 20-week fetus is *not* viable," and that "23½ to 24 weeks gestation is the earliest point in pregnancy where a reasonable possibility of via-

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[13] See Black's Law Dictionary 928 (5th ed. 1979) ("Necessary. This word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought").

bility exists." 662 F. Supp., at 420. But it also found that there may be a 4-week error in estimating gestational age, *id.*, at 421, which supports testing at 20 weeks.

In *Roe* v. *Wade*, the Court recognized that the State has "important and legitimate" interests in protecting maternal health and in the potentiality of human life. 410 U. S., at 162. During the second trimester, the State "may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health." *Id.*, at 164. After viability, when the State's interest in potential human life was held to become compelling, the State "may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.*, at 165.[14]

In *Colautti* v. *Franklin*, 439 U. S. 379 (1979), upon which appellees rely, the Court held that a Pennsylvania statute regulating the standard of care to be used by a physician performing an abortion of a possibly viable fetus was void for vagueness. *Id.*, at 390–401. But in the course of reaching that conclusion, the Court reaffirmed its earlier statement in *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 64 (1976), that "'the determination of whether a particu-

[14] The Court's subsequent cases have reflected this understanding. See *Colautti* v. *Franklin*, 439 U. S. 379, 386 (1979) (emphasis added) ("For both logical and biological reasons, we indicated in *[Roe]* that the State's interest in the potential life of the fetus reaches the compelling point at the stage of viability. Hence, *prior to viability, the State may not seek to further this interest by directly restricting a woman's decision whether or not to terminate her pregnancy*"); *id.*, at 389 ("Viability is the critical point. And we have recognized no attempt to stretch the point of viability one way or the other"); accord, *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S., at 61 (State regulation designed to protect potential human life limited to period "subsequent to viability"); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 428 (1983), quoting *Roe* v. *Wade*, 410 U. S., at 163 (emphasis added) (State's interest in protecting potential human life "becomes compelling *only* at viability, the point at which the fetus 'has the capability of meaningful life outside the mother's womb'").

lar fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.'" 439 U. S., at 396. JUSTICE BLACKMUN, *post*, at 545, n. 6, ignores the statement in *Colautti* that "neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus." 439 U. S., at 388–389. To the extent that § 188.029 regulates the method for determining viability, it undoubtedly does superimpose state regulation on the medical determination whether a particular fetus is viable. The Court of Appeals and the District Court thought it unconstitutional for this reason. 851 F. 2d, at 1074–1075; 662 F. Supp., at 423. To the extent that the viability tests increase the cost of what are in fact second-trimester abortions, their validity may also be questioned under *Akron*, 462 U. S., at 434–435, where the Court held that a requirement that second-trimester abortions must be performed in hospitals was invalid because it substantially increased the expense of those procedures.

We think that the doubt cast upon the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that the rigid trimester analysis of the course of a pregnancy enunciated in *Roe* has resulted in subsequent cases like *Colautti* and *Akron* making constitutional law in this area a virtual Procrustean bed. Statutes specifying elements of informed consent to be provided abortion patients, for example, were invalidated if they were thought to "structur[e] . . . the dialogue between the woman and her physician." *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 763 (1986). As the dissenters in *Thornburgh* pointed out, such a statute would have been sustained under any traditional standard of judicial review, *id.*, at 802 (WHITE, J., dissenting), or for any other surgical procedure except abortion. *Id.*, at 783 (Burger, C. J., dissenting).

Stare decisis is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. See *United States* v. *Scott*, 437 U. S. 82, 101 (1978). We have not refrained from reconsideration of a prior construction of the Constitution that has proved "unsound in principle and unworkable in practice." *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 546 (1985); see *Solorio* v. *United States*, 483 U. S. 435, 448–450 (1987); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 74–78 (1938). We think the *Roe* trimester framework falls into that category.

In the first place, the rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does. The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine.[15] As JUSTICE WHITE has put it, the trimester frame-

[15] For example, the Court has held that a State may require that certain information be given to a woman by a physician or his assistant, *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S., at 448, but that it may not require that such information be furnished to her only by the physician himself. *Id.*, at 449. Likewise, a State may require that abortions in the second trimester be performed in clinics, *Simopoulos* v. *Virginia*, 462 U. S. 506 (1983), but it may not require that such abortions be performed only in hospitals. *Akron*, *supra*, at 437–439. We do not think these distinctions are of any constitutional import in view of our abandonment of the trimester framework. JUSTICE BLACKMUN's claim, *post*, at 539–541, n. 1, that the State goes too far, even under *Maher* v. *Roe*, 432 U. S. 464 (1977); *Poelker* v. *Doe*, 432 U. S. 519 (1977); and *Harris* v. *McRae*, 448 U. S. 297 (1980), by refusing to permit the use of public facilities, as defined in Mo. Rev. Stat. § 188.200 (1986), for the performance of abortions is another example of the fine distinctions endemic in the *Roe* framework.

work has left this Court to serve as the country's "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S., at 99 (opinion concurring in part and dissenting in part). Cf. *Garcia*, *supra*, at 547.

In the second place, we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability. The dissenters in *Thornburgh*, writing in the context of the *Roe* trimester analysis, would have recognized this fact by positing against the "fundamental right" recognized in *Roe* the State's "compelling interest" in protecting potential human life throughout pregnancy. "[T]he State's interest, if compelling after viability, is equally compelling before viability." *Thornburgh*, 476 U. S., at 795 (WHITE, J., dissenting); see *id.*, at 828 (O'CONNOR, J., dissenting) ("State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy'") (citation omitted).

The tests that § 188.029 requires the physician to perform are designed to determine viability. The State here has chosen viability as the point at which its interest in potential human life must be safeguarded. See Mo. Rev. Stat. § 188.030 (1986) ("No abortion of a viable unborn child shall be performed unless necessary to preserve the life or health of the woman"). It is true that the tests in question increase the expense of abortion, and regulate the discretion of the physician in determining the viability of the fetus. Since the tests will undoubtedly show in many cases that the fetus is not viable, the tests will have been performed for what were in fact second-trimester abortions. But we are satisfied that the requirement of these tests permissibly furthers

the State's interest in protecting potential human life, and we therefore believe § 188.029 to be constitutional.

JUSTICE BLACKMUN takes us to task for our failure to join in a "great issues" debate as to whether the Constitution includes an "unenumerated" general right to privacy as recognized in cases such as *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), and *Roe*. But *Griswold* v. *Connecticut*, unlike *Roe*, did not purport to adopt a whole framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply. As such, it was far different from the opinion, if not the holding, of *Roe* v. *Wade*, which sought to establish a constitutional framework for judging state regulation of abortion during the entire term of pregnancy. That framework sought to deal with areas of medical practice traditionally subject to state regulation, and it sought to balance once and for all by reference only to the calendar the claims of the State to protect the fetus as a form of human life against the claims of a woman to decide for herself whether or not to abort a fetus she was carrying. The experience of the Court in applying *Roe* v. *Wade* in later cases, see *supra*, at 518, n. 15, suggests to us that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a "fundamental right" to abortion, as the Court described it in *Akron*, 462 U. S. at 420, n. 1, a "limited fundamental constitutional right," which JUSTICE BLACKMUN today treats *Roe* as having established, *post*, at 555, or a liberty interest protected by the Due Process Clause, which we believe it to be. The Missouri testing requirement here is reasonably designed to ensure that abortions are not performed where the fetus is viable—an end which all concede is legitimate—and that is sufficient to sustain its constitutionality.

JUSTICE BLACKMUN also accuses us, *inter alia*, of cowardice and illegitimacy in dealing with "the most politically divisive domestic legal issue of our time." *Post*, at 559. There is

no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of cases such as *Colautti* v. *Franklin*, 439 U. S. 379 (1979), and *Akron* v. *Akron Center for Reproductive Health, Inc.*, *supra*. But the goal of constitutional adjudication is surely not to remove inexorably "politically divisive" issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them. The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not. We think we have done that today. JUSTICE BLACKMUN's suggestion, *post*, at 538, 557–558, that legislative bodies, in a Nation where more than half of our population is women, will treat our decision today as an invitation to enact abortion regulation reminiscent of the Dark Ages not only misreads our views but does scant justice to those who serve in such bodies and the people who elect them.

III

Both appellants and the United States as *amicus curiae* have urged that we overrule our decision in *Roe* v. *Wade*. Brief for Appellants 12–18; Brief for United States as *Amicus Curiae* 8–24. The facts of the present case, however, differ from those at issue in *Roe*. Here, Missouri has determined that viability is the point at which its interest in potential human life must be safeguarded. In *Roe*, on the other hand, the Texas statute criminalized the performance of *all* abortions, except when the mother's life was at stake. 410 U. S., at 117–118. This case therefore affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause, *id.*, at 164, and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases.

Because none of the challenged provisions of the Missouri Act properly before us conflict with the Constitution, the judgment of the Court of Appeals is

Reversed.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I concur in Parts I, II–A, II–B, and II–C of the Court's opinion.

I

Nothing in the record before us or the opinions below indicates that subsections 1(1) and 1(2) of the preamble to Missouri's abortion regulation statute will affect a woman's decision to have an abortion. JUSTICE STEVENS, following appellees, see Brief for Appellees 22, suggests that the preamble may also "interfer[e] with contraceptive choices," *post*, at 564, because certain contraceptive devices act on a female ovum after it has been fertilized by a male sperm. The Missouri Act defines "conception" as "the fertilization of the ovum of a female by a sperm of a male," Mo. Rev. Stat. § 188.015(3) (1986), and invests "unborn children" with "protectable interests in life, health, and well-being," § 1.205.1(2), from "the moment of conception . . . ." § 1.205.3. JUSTICE STEVENS asserts that any possible interference with a woman's right to use such postfertilization contraceptive devices would be unconstitutional under *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), and our subsequent contraception cases. *Post*, at 564–566. Similarly, certain *amici* suggest that the Missouri Act's preamble may prohibit the developing technology of *in vitro* fertilization, a technique used to aid couples otherwise unable to bear children in which a number of ova are removed from the woman and fertilized by male sperm. This process often produces excess fertilized ova ("unborn children" under the Missouri Act's definition) that are discarded rather than reinserted into the woman's uterus. Brief for Association of Reproductive Health Pro-

fessionals et al. as *Amici Curiae* 38. It may be correct that the use of postfertilization contraceptive devices is constitutionally protected by *Griswold* and its progeny, but, as with a woman's abortion decision, nothing in the record or the opinions below indicates that the preamble will affect a woman's decision to practice contraception. For that matter, nothing in appellees' original complaint, App. 8–21, or their motion *in limine* to limit testimony and evidence on their challenge to the preamble, *id.*, at 57–59, indicates that appellees sought to enjoin potential violations of *Griswold*. Neither is there any indication of the possibility that the preamble might be applied to prohibit the performance of *in vitro* fertilization. I agree with the Court, therefore, that all of these intimations of unconstitutionality are simply too hypothetical to support the use of declaratory judgment procedures and injunctive remedies in this case.

Similarly, it seems to me to follow directly from our previous decisions concerning state or federal funding of abortions, *Harris* v. *McRae*, 448 U. S. 297 (1980), *Maher* v. *Roe*, 432 U. S. 464 (1977), and *Poelker* v. *Doe*, 432 U. S. 519 (1977), that appellees' facial challenge to the constitutionality of Missouri's ban on the utilization of public facilities and the participation of public employees in the performance of abortions not necessary to save the life of the mother, Mo. Rev. Stat. §§ 188.210, 188.215 (1986), cannot succeed. Given Missouri's definition of "public facility" as "any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivisions thereof," § 188.200(2), there may be conceivable applications of the ban on the use of public facilities that would be unconstitutional. Appellees and *amici* suggest that the State could try to enforce the ban against private hospitals using public water and sewage lines, or against private hospitals leasing state-owned equipment or state land. See Brief for Appellees 49–50; Brief for National Association of Public Hospitals as *Amicus Curiae*

9–12. Whether some or all of these or other applications of § 188.215 would be constitutional need not be decided here. *Maher*, *Poelker*, and *McRae* stand for the proposition that some quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [relevant statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987).

I also agree with the Court that, under the interpretation of § 188.205 urged by the State and adopted by the Court, there is no longer a case or controversy before us over the constitutionality of that provision. I would note, however, that this interpretation of § 188.205 is not binding on the Supreme Court of Missouri which has the final word on the meaning of that State's statutes. *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 395 (1988); *O'Brien* v. *Skinner*, 414 U. S. 524, 531 (1974). Should it happen that § 188.205, as ultimately interpreted by the Missouri Supreme Court, does prohibit publicly employed health professionals from giving specific medical advice to pregnant women, "the vacation and dismissal of the complaint that has become moot 'clears the path for future relitigation of the issues between the parties,' should subsequent events rekindle their controversy." *Deakins* v. *Monaghan*, 484 U. S. 193, 201, n. 5 (1988), quoting *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 40 (1950). Unless such events make their appearance and give rise to relitigation, I agree that we and all federal

courts are without jurisdiction to hear the merits of this moot dispute.

II

In its interpretation of Missouri's "determination of viability" provision, Mo. Rev. Stat. § 188.029 (1986), see *ante*, at 513–521, the plurality has proceeded in a manner unnecessary to deciding the question at hand. I agree with the plurality that it was plain error for the Court of Appeals to interpret the second sentence of § 188.029 as meaning that "doctors *must* perform tests to find gestational age, fetal weight and lung maturity." 851 F. 2d 1071, 1075, n. 5 (CA8 1988) (emphasis in original). When read together with the first sentence of § 188.029—which requires a physician to "determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions"—it would be contradictory nonsense to read the second sentence as requiring a physician to perform viability examinations and tests in situations where it would be careless and imprudent to do so. The plurality is quite correct: "the viability-testing provision makes sense only if the second sentence is read to require only those tests that are useful to making subsidiary findings as to viability," *ante*, at 514, and, I would add, only those examinations and tests that it would not be imprudent or careless to perform in the particular medical situation before the physician.

Unlike the plurality, I do not understand these viability testing requirements to conflict with any of the Court's past decisions concerning state regulation of abortion. Therefore, there is no necessity to accept the State's invitation to reexamine the constitutional validity of *Roe* v. *Wade*, 410 U. S. 113 (1973). Where there is no need to decide a constitutional question, it is a venerable principle of this Court's adjudicatory processes not to do so, for "[t]he Court will not 'anticipate a question of constitutional law in advance of the

necessity of deciding it.'" *Ashwander* v. *TVA*, 297 U. S. 288, 346 (1936) (Brandeis, J., concurring), quoting *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). Neither will it generally "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." 297 U. S., at 347. Quite simply, "[i]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton* v. *United States*, 196 U. S. 283, 295 (1905). The Court today has accepted the State's every interpretation of its abortion statute and has upheld, under our existing precedents, every provision of that statute which is properly before us. Precisely for this reason reconsideration of *Roe* falls not into any "good-cause exception" to this "fundamental rule of judicial restraint . . . ." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 157 (1984). See *post*, at 532–533 (SCALIA, J., concurring in part and concurring in judgment). When the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe* v. *Wade*, there will be time enough to reexamine *Roe*. And to do so carefully.

In assessing § 188.029 it is especially important to recognize that appellees did not appeal the District Court's ruling that the first sentence of § 188.029 is constitutional. 662 F. Supp. 407, 420–422 (WD Mo. 1987). There is, accordingly, no dispute between the parties before us over the constitutionality of the "presumption of viability at 20 weeks," *ante*, at 515, created by the first sentence of § 188.029. If anything might arguably conflict with the Court's previous decisions concerning the determination of viability, I would think it is the introduction of this presumption. The plurality, see *ante*, at 515, refers to a passage from *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 64 (1976): "The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must

be, a matter for the judgment of the responsible attending physician." The 20-week presumption of viability in the first sentence of § 188.029, it could be argued (though, I would think, unsuccessfully), restricts "the judgment of the responsible attending physician," by imposing on that physician the burden of overcoming the presumption. This presumption may be a "superimpos[ition] [of] state regulation on the medical determination whether a particular fetus is viable," *ante*, at 517, but, if so, it is a restriction on the physician's judgment that is not before us. As the plurality properly interprets the second sentence of § 188.029, it does nothing more than delineate means by which the unchallenged 20-week presumption of viability may be overcome if those means are useful in doing so and can be prudently employed. Contrary to the plurality's suggestion, see *ante*, at 517, the District Court did not think the second sentence of § 188.029 unconstitutional for this reason. Rather, both the District Court and the Court of Appeals thought the second sentence to be unconstitutional precisely because they interpreted that sentence to impose state regulation on the determination of viability that it does not impose.

Appellees suggest that the interpretation of § 188.029 urged by the State may "virtually eliminat[e] the constitutional issue in this case." Brief for Appellees 30. Appellees therefore propose that we should abstain from deciding that provision's constitutionality "in order to allow the state courts to render the saving construction the State has proposed." *Ibid.* Where the lower court has so clearly fallen into error I do not think abstention is necessary or prudent. Accordingly, I consider the constitutionality of the second sentence of § 188.029, as interpreted by the State, to determine whether the constitutional issue is actually eliminated.

I do not think the second sentence of § 188.029, as interpreted by the Court, imposes a degree of state regulation on the medical determination of viability that in any way conflicts with prior decisions of this Court. As the plurality

recognizes, the requirement that, where not imprudent, physicians perform examinations and tests useful to making subsidiary findings to determine viability "promot[es] the State's interest in potential human life rather than in maternal health." *Ante*, at 515. No decision of this Court has held that the State may not directly promote its interest in potential life when viability is possible. Quite the contrary. In *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986), the Court considered a constitutional challenge to a Pennsylvania statute requiring that a second physician be present during an abortion performed "when viability is possible." *Id.*, at 769–770. For guidance, the Court looked to the earlier decision in *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476 (1983), upholding a Missouri statute requiring the presence of a second physician during an abortion performed after viability. *Id.*, at 482–486 (opinion of Powell, J.); *id.*, at 505 (O'CONNOR, J., concurring in judgment in part and dissenting in part). The *Thornburgh* majority struck down the Pennsylvania statute merely because the statute had no exception for emergency situations and not because it found a constitutional difference between the State's promotion of its interest in potential life when viability is possible and when viability is certain. 476 U. S., at 770–771. Despite the clear recognition by the *Thornburgh* majority that the Pennsylvania and Missouri statutes differed in this respect, there is no hint in the opinion of the *Thornburgh* Court that the State's interest in potential life differs depending on whether it seeks to further that interest postviability or when viability is possible. Thus, all nine Members of the *Thornburgh* Court appear to have agreed that it is not constitutionally impermissible for the State to enact regulations designed to protect the State's interest in potential life when viability is possible. See *id.*, at 811 (WHITE, J., dissenting); *id.*, at 832 (O'CONNOR, J., dissenting). That is exactly what Missouri has done in § 188.029.

Similarly, the basis for reliance by the District Court and the Court of Appeals below on *Colautti* v. *Franklin*, 439 U. S. 379 (1979), disappears when § 188.029 is properly interpreted. In *Colautti*, the Court observed:

> "Because this point [of viability] may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the critical point." *Id.*, at 388–389.

The courts below, on the interpretation of § 188.029 rejected here, found the second sentence of that provision at odds with this passage from *Colautti*. See 851 F. 2d, at 1074; 662 F. Supp., at 423. On this Court's interpretation of § 188.029 it is clear that Missouri has not substituted any of the "elements entering into the ascertainment of viability" as "the determinant of when the State has a compelling interest in the life or health of the fetus." All the second sentence of § 188.029 does is to require, when not imprudent, the performance of "those tests that are useful to making *subsidiary* findings as to viability." *Ante*, at 514 (emphasis added). Thus, consistent with *Colautti*, viability remains the "critical point" under § 188.029.

Finally, and rather halfheartedly, the plurality suggests that the marginal increase in the cost of an abortion created by Missouri's viability testing provision may make § 188.029, even as interpreted, suspect under this Court's decision in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 434–439 (1983), striking down a second-trimester hospitalization requirement. See *ante*, at 517. I dissented from the Court's opinion in *Akron* because it was my view that, even apart from *Roe*'s trimester framework which I continue to consider problematic, see *Thornburgh*, *supra*, at

828 (dissenting opinion), the *Akron* majority had distorted and misapplied its own standard for evaluating state regulation of abortion which the Court had applied with fair consistency in the past: that, previability, "a regulation imposed on a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion." *Akron*, *supra*, at 453 (dissenting opinion) (internal quotations omitted).

It is clear to me that requiring the performance of examinations and tests useful to determining whether a fetus is viable, when viability is possible, and when it would not be medically imprudent to do so, does not impose an undue burden on a woman's abortion decision. On this ground alone I would reject the suggestion that § 188.029 as interpreted is unconstitutional. More to the point, however, just as I see no conflict between § 188.029 and *Colautti* or any decision of this Court concerning a State's ability to give effect to its interest in potential life, I see no conflict between § 188.029 and the Court's opinion in *Akron*. The second-trimester hospitalization requirement struck down in *Akron* imposed, in the majority's view, "a heavy, and unnecessary, burden," 462 U. S., at 438, more than doubling the cost of "women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." *Ibid.*; see also *id.*, at 434. By contrast, the cost of examinations and tests that could usefully and prudently be performed when a woman is 20–24 weeks pregnant to determine whether the fetus is viable would only marginally, if at all, increase the cost of an abortion. See Brief for American Association of Prolife Obstetricians and Gynecologists et al. as *Amici Curiae* 3 ("At twenty weeks gestation, an ultrasound examination to determine gestational age is standard medical practice. It is routinely provided by the plaintiff clinics. An ultrasound examination can effectively provide all three designated findings of sec. 188.029"); *id.*, at 22 ("A finding of fetal weight can be obtained from the same ultrasound test used to determine gestational age"); *id.*, at 25 ("There are a number of different

methods in standard medical practice to determine fetal lung maturity at twenty or more weeks gestation. The most simple and most obvious is by inference. It is well known that fetal lungs do not mature until 33–34 weeks gestation. . . . If an assessment of the gestational age indicates that the child is less than thirty-three weeks, a general finding can be made that the fetal lungs are not mature. This finding can then be used by the physician in making his determination of viability under section 188.029"); cf. Brief for American Medical Association et al. as *Amici Curiae* 42 (no suggestion that fetal weight and gestational age cannot be determined from the same sonogram); *id.*, at 43 (another clinical test for gestational age and, by inference, fetal weight and lung maturity, is an accurate report of the last menstrual period), citing Smith, Frey, & Johnson, Assessing Gestational Age, 33 Am. Fam. Physician 215, 219–220 (1986).

Moreover, the examinations and tests required by § 188.029 are to be performed when viability is possible. This feature of § 188.029 distinguishes it from the second-trimester hospitalization requirement struck down by the *Akron* majority. As the Court recognized in *Thornburgh*, the State's compelling interest in potential life postviability renders its interest in determining the critical point of viability equally compelling. See *supra*, at 527–528. Under the Court's precedents, the same cannot be said for the *Akron* second-trimester hospitalization requirement. As I understand the Court's opinion in *Akron*, therefore, the plurality's suggestion today that *Akron* casts doubt on the validity of § 188.029, even as the Court has interpreted it, is without foundation and cannot provide a basis for reevaluating *Roe*. Accordingly, because the Court of Appeals misinterpreted § 188.029, and because, properly interpreted, § 188.029 is not inconsistent with any of this Court's prior precedents, I would reverse the decision of the Court of Appeals.

In sum, I concur in Parts I, II–A, II–B, and II–C of the Court's opinion and concur in the judgment as to Part II–D.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join Parts I, II–A, II–B, and II–C of the opinion of the Court. As to Part II–D, I share JUSTICE BLACKMUN's view, *post*, at 556, that it effectively would overrule *Roe* v. *Wade*, 410 U. S. 113 (1973). I think that should be done, but would do it more explicitly. Since today we contrive to avoid doing it, and indeed to avoid almost any decision of national import, I need not set forth my reasons, some of which have been well recited in dissents of my colleagues in other cases. See, *e. g.*, *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 786–797 (1986) (WHITE, J., dissenting); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 453–459 (1983) (O'CONNOR, J., dissenting); *Roe* v. *Wade*, *supra*, at 172–178 (REHNQUIST, J., dissenting); *Doe* v. *Bolton*, 410 U. S. 179, 221–223 (1973) (WHITE, J., dissenting).

The outcome of today's case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike needlessly to prolong this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical—a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive.

JUSTICE O'CONNOR's assertion, *ante*, at 526, that a "'fundamental rule of judicial restraint'" requires us to avoid reconsidering *Roe*, cannot be taken seriously. By finessing *Roe* we do not, as she suggests, *ibid.*, adhere to the strict and venerable rule that we should avoid "'decid[ing] questions of a constitutional nature.'" We have not disposed of this case on some statutory or procedural ground, but have decided, and could not avoid deciding, whether the Missouri statute meets the requirements of the United States Con-

stitution. The only choice available is whether, in deciding that constitutional question, we should use *Roe* v. *Wade* as the benchmark, or something else. What is involved, therefore, is not the rule of avoiding constitutional issues where possible, but the quite separate principle that we will not "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ante*, at 526. The latter is a sound general principle, but one often departed from when good reason exists. Just this Term, for example, in an opinion authored by JUSTICE O'CONNOR, despite the fact that we had already held a racially based set-aside unconstitutional because unsupported by evidence of identified discrimination, which was all that was needed to decide the case, we went on to outline the criteria for properly tailoring race-based remedies in cases where such evidence is present. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 506–508 (1989). Also this Term, in an opinion joined by JUSTICE O'CONNOR, we announced the constitutional rule that deprivation of the right to confer with counsel during trial violates the Sixth Amendment even if no prejudice can be shown, despite our finding that there had been no such deprivation on the facts before us—which was all that was needed to decide that case. *Perry* v. *Leeke*, 488 U. S. 272, 278–280 (1989); see *id.*, at 285 (KENNEDY, J., concurring in part). I have not identified with certainty the first instance of our deciding a case on broader constitutional grounds than absolutely necessary, but it is assuredly no later than *Marbury* v. *Madison*, 1 Cranch 137 (1803), where we held that mandamus could constitutionally issue against the Secretary of State, although that was unnecessary given our holding that the law authorizing issuance of the mandamus by this Court was unconstitutional.

The Court has often spoken more broadly than needed in precisely the fashion at issue here, announcing a new rule of constitutional law when it could have reached the identical result by applying the rule thereby displaced. To describe

two recent opinions that JUSTICE O'CONNOR joined: In *Daniels* v. *Williams*, 474 U. S. 327 (1986), we overruled our prior holding that a "deprivation" of liberty or property could occur through negligent governmental acts, ignoring the availability of the alternative constitutional ground that, even if a deprivation had occurred, the State's postdeprivation remedies satisfied due process, see *id.*, at 340–343 (STEVENS, J., concurring in judgment). In *Illinois* v. *Gates*, 462 U. S. 213 (1983), we replaced the pre-existing "two-pronged" constitutional test for probable cause with a totality-of-the-circumstances approach, ignoring the concurrence's argument that the same outcome could have been reached under the old test, see *id.*, at 267–272 (WHITE, J., concurring in judgment). It is rare, of course, that the Court goes out of its way to *acknowledge* that its judgment could have been reached under the old constitutional rule, making its adoption of the new one unnecessary to the decision, but even such explicit acknowledgment is not unheard of. See *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981); *Perez* v. *Campbell*, 402 U. S. 637 (1971). For a sampling of other cases where the availability of a narrower, well-established ground is simply ignored in the Court's opinion adopting a new constitutional rule, though pointed out in separate opinions of some Justices, see *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976); *Pointer* v. *Texas*, 380 U. S. 400 (1965); and *Mapp* v. *Ohio*, 367 U. S. 643 (1961). It would be wrong, in any decision, to ignore the reality that our policy not to "formulate a rule of constitutional law broader than is required by the precise facts" has a frequently applied good-cause exception. But it seems particularly perverse to convert the policy into an absolute in the present case, in order to place beyond reach the inexpressibly "broader-than-was-required-by-the-precise-facts" structure established by *Roe* v. *Wade*.

The real question, then, is whether there are valid reasons to go beyond the most stingy possible holding today. It seems to me there are not only valid but compelling ones.

Ordinarily, speaking no more broadly than is absolutely required avoids throwing settled law into confusion; doing so today preserves a chaos that is evident to anyone who can read and count. Alone sufficient to justify a broad holding is the fact that our retaining control, through *Roe*, of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of this Court. We can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us—their unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will—to follow the popular will. Indeed, I expect we can look forward to even more of that than before, given our indecisive decision today. And if these reasons for taking the unexceptional course of reaching a broader holding are not enough, then consider the nature of the constitutional question we avoid: In most cases, we do no harm by not speaking more broadly than the decision requires. Anyone affected by the conduct that the avoided holding would have prohibited will be able to challenge it himself and have his day in court to make the argument. Not so with respect to the harm that many States believed, pre-*Roe*, and many may continue to believe, is caused by largely unrestricted abortion. That will continue to occur if the States have the constitutional power to prohibit it, and would do so, but we skillfully avoid telling them so. Perhaps those abortions cannot constitutionally be proscribed. That is surely an arguable question, the question that reconsideration of *Roe* v. *Wade* entails. But what is not at all arguable, it seems to me, is that we should decide now and not insist that we be run into a corner before we grudgingly yield up our judgment. The only sound reason for the latter course is to prevent a change in the law—but to think that desirable begs the question to be decided.

It was an arguable question today whether § 188.029 of the Missouri law contravened this Court's understanding of *Roe* v. *Wade*,* and I would have examined *Roe* rather than

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*That question, compared with the question whether we should reconsider and reverse *Roe*, is hardly worth a footnote, but I think JUSTICE O'CONNOR answers that incorrectly as well. In *Roe* v. *Wade*, 410 U. S. 113, 165–166 (1973), we said that "the physician [has the right] to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention." We have subsequently made clear that it is also a matter of medical judgment when viability (one of those points) is reached. "The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 64 (1976). Section 188.029 conflicts with the purpose and hence the fair import of this principle because it will sometimes require a physician to perform tests that he would not otherwise have performed to determine whether a fetus is viable. It is therefore a legislative imposition on the judgment of the physician, and one that increases the cost of an abortion.

JUSTICE O'CONNOR would nevertheless uphold the law because it "does not impose an undue burden on a woman's abortion decision." *Ante*, at 530. This conclusion is supported by the observation that the required tests impose only a marginal cost on the abortion procedure, far less of an increase than the cost-doubling hospitalization requirement invalidated in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983). See *ante*, at 530–531. The fact that the challenged regulation is less costly than what we struck down in *Akron* tells us only that we cannot decide the present case on the basis of that earlier decision. It does not tell us whether the present requirement is an "undue burden," and I know of no basis for determining that this particular burden (or any other for that matter) is "due." One could with equal justification conclude that it is not. To avoid the question of *Roe* v. *Wade*'s validity, with the attendant costs that this will have for the Court and for the principles of self-governance, on the basis of a standard that offers "no guide but the Court's own discretion," *Baldwin* v. *Missouri*, 281 U. S. 586, 595 (1930) (Holmes, J., dissenting), merely adds to the irrationality of what we do today.

Similarly irrational is the new concept that JUSTICE O'CONNOR introduces into the law in order to achieve her result, the notion of a State's "interest in potential life when viability is possible." *Ante*, at 528. Since "viability" means the mere *possibility* (not the certainty) of survivability

examining the contravention. Given the Court's newly contracted abstemiousness, what will it take, one must wonder, to permit us to reach that fundamental question? The result of our vote today is that we will not reconsider that prior opinion, even if most of the Justices think it is wrong, unless we have before us a statute that in fact contradicts it—and even then (under our newly discovered "no-broader-than-necessary" requirement) only minor problematical aspects of *Roe* will be reconsidered, unless one expects state legislatures to adopt provisions whose compliance with *Roe* cannot even be argued with a straight face. It thus appears that the mansion of constitutionalized abortion law, constructed overnight in *Roe* v. *Wade*, must be disassembled doorjamb by doorjamb, and never entirely brought down, no matter how wrong it may be.

Of the four courses we might have chosen today—to reaffirm *Roe*, to overrule it explicitly, to overrule it *sub silentio*, or to avoid the question—the last is the least responsible. On the question of the constitutionality of § 188.029, I concur in the judgment of the Court and strongly dissent from the manner in which it has been reached.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and dissenting in part.

Today, *Roe* v. *Wade*, 410 U. S. 113 (1973), and the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive but are not secure. Although the Court extricates itself from this case without making a single, even incremental, change in the law of abortion, the plurality and JUSTICE SCALIA would overrule *Roe* (the first silently, the other explicitly) and would return to the States

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outside the womb, "possible viability" must mean the possibility of a possibility of survivability outside the womb. Perhaps our next opinion will expand the third trimester into the second even further, by approving state action designed to take account of "the chance of possible viability."

virtually unfettered authority to control the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term. Although today, no less than yesterday, the Constitution and the decisions of this Court prohibit a State from enacting laws that inhibit women from the meaningful exercise of that right, a plurality of this Court implicitly invites every state legislature to enact more and more restrictive abortion regulations in order to provoke more and more test cases, in the hope that sometime down the line the Court will return the law of procreative freedom to the severe limitations that generally prevailed in this country before January 22, 1973. Never in my memory has a plurality announced a judgment of this Court that so foments disregard for the law and for our standing decisions.

Nor in my memory has a plurality gone about its business in such a deceptive fashion. At every level of its review, from its effort to read the real meaning out of the Missouri statute, to its intended evisceration of precedents and its deafening silence about the constitutional protections that it would jettison, the plurality obscures the portent of its analysis. With feigned restraint, the plurality announces that its analysis leaves *Roe* "undisturbed," albeit "modif[ied] and narrow[ed]." *Ante*, at 521. But this disclaimer is totally meaningless. The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly, but turns a stone face to anyone in search of what the plurality conceives as the scope of a woman's right under the Due Process Clause to terminate a pregnancy free from the coercive and brooding influence of the State. The simple truth is that *Roe* would not survive the plurality's analysis, and that the plurality provides no substitute for *Roe*'s protective umbrella.

I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided. I fear for the integrity of, and public esteem for, this Court.

I dissent.

I

THE CHIEF JUSTICE parades through the four challenged sections of the Missouri statute *seriatim*. I shall not do this, but shall relegate most of my comments as to those sections to the margin.[1] Although I disagree with the Court's con-

[1] Contrary to the Court, I do not see how the preamble, § 1.205, realistically may be construed as "abortion-neutral." It declares that "[t]he life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health, and well-being." Mo. Rev. Stat. §§ 1.205.1(1) and (2) (1986). By the preamble's specific terms, these declarations apply to all of Missouri's laws which, in turn, are to be interpreted to protect the rights of the unborn to the fullest extent possible under the Constitution of the United States and the decisions of this Court. § 1.205.2. As the Court of Appeals concluded, the Missouri Legislature "intended its abortion regulations to be understood against the backdrop of its theory of life." 851 F. 2d 1071, 1076 (CA8 1988). I note the United States' acknowledgment that this backdrop places "a burden of uncertain scope on the performance of abortions by supplying a general principle that would fill in whatever interstices may be present in existing abortion precedents." Brief for United States as *Amicus Curiae* on behalf of appellants 8–9, n. 5.

In my view, a State may not expand indefinitely the scope of its abortion regulations by creating interests in fetal life that are limited solely by reference to the decisional law of this Court. Such a statutory scheme, whose scope is dependent on the uncertain and disputed limits of our holdings, will have the unconstitutional effect of chilling the exercise of a woman's right to terminate a pregnancy and of burdening the freedom of health professionals to provide abortion services. In this case, moreover, because the preamble defines fetal life as beginning upon "the fertilization of the ovum of a female by a sperm of a male," § 188.015(3), the provision also unconstitutionally burdens the use of contraceptive devices, such as the IUD and the "morning after" pill, which may operate to prevent pregnancy only after conception as defined in the statute. See Brief for Association of Reproductive Health Professionals et al. as *Amici Curiae* 30–39.

The Court upholds §§ 188.210 and 188.215 on the ground that the constitutionality of these provisions follows from our holdings in *Maher* v. *Roe*, 432 U. S. 464 (1977), *Poelker* v. *Doe*, 432 U. S. 519 (1977), and *Harris* v. *McRae*, 448 U. S. 297 (1980). There were strong dissents in all those cases.

Whatever one may think of *Maher*, *Poelker*, and *Harris*, however, they most certainly do not control this case, where the State not only has withdrawn from the business of abortion, but has taken affirmative steps to

sideration of §§ 1.205, 188.210, and 188.215, and am especially disturbed by its misapplication of our past decisions in upholding Missouri's ban on the performance of abortions at

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assure that abortions are not performed by *private* physicians in *private* institutions. Specifically, by defining "public facility" as "any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivisions thereof," § 188.200, the Missouri statute prohibits the performance of abortions in institutions that in all pertinent respects are private, yet are located on property owned, leased, or controlled by the government. Thus, under the statute, no abortion may be performed at Truman Medical Center in Kansas City—where, in 1985, 97 percent of all Missouri hospital abortions at 16 weeks or later were performed—even though the Center is a private hospital, staffed primarily by private doctors, and administered by a private corporation: the Center is located on ground leased from a political subdivision of the State.

The sweeping scope of Missouri's "public facility" provision sharply distinguishes this case from *Maher*, *Poelker*, and *Harris*. In one of those cases, it was said: "The State may have made childbirth a more attractive alternative . . . but it . . . imposed no restriction on access to abortions that was not already there." *Maher*, 432 U. S., at 474. Missouri's public facility ban, by contrast, goes far beyond merely offering incentives in favor of childbirth (as in *Maher* and *Harris*), or a straightforward disassociation of state-owned institutions and personnel from abortion services (as in *Poelker*). Here, by defining as "public" every health-care institution with some connection to the State, no matter how attenuated, Missouri has brought to bear the full force of its economic power and control over essential facilities to discourage its citizens from exercising their constitutional rights, even where the State itself could never be understood as authorizing, supporting, or having any other positive association with the performance of an abortion. See R. Dworkin, The Great Abortion Case, New York Review of Books, June 29, 1989, p. 49.

The difference is critical. Even if the State may decline to subsidize or to participate in the exercise of a woman's right to terminate a pregnancy, and even if a State may pursue its own abortion policies in distributing public benefits, it may not affirmatively constrict the availability of abortions by defining as "public" that which in all meaningful respects is private. With the certain knowledge that a substantial percentage of private health-care providers will fall under the public facility ban, see Brief for National Association of Public Hospitals as *Amicus Curiae* 10–11, Missouri does not "leav[e] a pregnant woman with the same choices as if the State

"public facilities," its discussion of these provisions is merely prologue to the plurality's consideration of the statute's viability-testing requirement, § 188.029—the only section of the Missouri statute that the plurality construes as implicating *Roe* itself. There, tucked away at the end of its opinion, the plurality suggests a radical reversal of the law of abortion; and there, primarily, I direct my attention.

In the plurality's view, the viability-testing provision imposes a burden on second-trimester abortions as a way of furthering the State's interest in protecting the potential life of the fetus. Since under the *Roe* framework, the State may not fully regulate abortion in the interest of potential life (as opposed to maternal health) until the third trimester, the plurality finds it necessary, in order to save the Missouri testing provision, to throw out *Roe*'s trimester framework. *Ante*, at 518–520. In flat contradiction to *Roe*, 410 U. S., at 163, the plurality concludes that the State's interest in potential life is compelling before viability, and upholds the testing provision

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had chosen not to operate any public hospitals at all," *ante*, at 509; rather, the public facility ban leaves the pregnant woman with far fewer choices, or, for those too sick or too poor to travel, perhaps no choice at all. This aggressive and shameful infringement on the right of women to obtain abortions in consultation with their chosen physicians, unsupported by any state interest, much less a compelling one, violates the command of *Roe*.

Indeed, JUSTICE O'CONNOR appears to recognize the constitutional difficulties presented by Missouri's "public facilities" ban, and rejects respondents' "facial" challenge to the provisions on the ground that a facial challenge cannot succeed where, as here, at least some applications of the challenged law are constitutional. *Ante*, at 523–524. While I disagree with this approach, JUSTICE O'CONNOR's writing explicitly leaves open the possibility that some applications of the "public facilities" ban may be unconstitutional, regardless of *Maher*, *Poelker*, and *Harris*.

I concur in Part II–C of the Court's opinion, holding that respondents' challenge to § 188.205 is moot, although I note that the constitutionality of this provision might become the subject of relitigation between these parties should the Supreme Court of Missouri adopt an interpretation of the provision that differs from the one accepted here. See *Deakins* v. *Monaghan*, 484 U. S. 193, 201, n. 5 (1988).

because it "permissibly furthers" that state interest. *Ante*, at 519.

A

At the outset, I note that in its haste to limit abortion rights, the plurality compounds the errors of its analysis by needlessly reaching out to address constitutional questions that are not actually presented. The conflict between § 188.029 and *Roe*'s trimester framework, which purportedly drives the plurality to reconsider our past decisions, is a contrived conflict: the product of an aggressive misreading of the viability-testing requirement and a needlessly wooden application of the *Roe* framework.

The plurality's reading of § 188.029 is irreconcilable with the plain language of the statute and is in derogation of this Court's settled view that "'district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.'" *Frisby* v. *Schultz*, 487 U. S. 474, 482 (1988), quoting *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 499–500 (1985). Abruptly setting aside the construction of § 188.029 adopted by both the District Court and Court of Appeals as "plain error," the plurality reads the viability-testing provision as requiring only that before a physician may perform an abortion on a woman whom he believes to be carrying a fetus of 20 or more weeks gestational age, the doctor must determine whether the fetus is viable and, as part of that exercise, must, to the extent feasible and consistent with sound medical practice, conduct tests necessary to make findings of gestational age, weight, and lung maturity. *Ante*, at 514–517. But the plurality's reading of the provision, according to which the statute requires the physician to perform tests only in order to determine *viability*, ignores the statutory language explicitly directing that "the physician *shall* perform or cause to be performed such medical examinations and tests as are *necessary to make a finding of the gestational age, weight, and lung maturity* of the unborn child and *shall* enter such findings" in the mother's medical record. § 188.029 (emphasis added). The

statute's plain language requires the physician to undertake whatever tests are necessary to determine gestational age, weight, and lung maturity, regardless of whether these tests are necessary to a finding of viability, and regardless of whether the tests subject the pregnant woman or the fetus to additional health risks or add substantially to the cost of an abortion.[2]

Had the plurality read the statute as written, it would have had no cause to reconsider the *Roe* framework. As properly construed, the viability-testing provision does not pass constitutional muster under even a rational-basis standard, the least restrictive level of review applied by this Court. See *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955). By mandating tests to determine fetal weight and lung maturity for every fetus thought to be more than 20 weeks gestational age, the statute requires physicians to undertake procedures, such as amniocentesis, that, in the situation presented, have no medical justification, impose significant additional health risks on both the pregnant woman and the fetus, and bear no rational relation to the State's interest in protecting fetal life.[3] As written, § 188.029 is an arbitrary imposition of discomfort, risk, and expense, furthering no discernible interest except to make the procurement of an abortion as arduous and difficult as possible. Thus, were it not for

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[2] I consider irrefutable JUSTICE STEVENS' discussion of this interpretive point. See *post*, at 560–563.

[3] The District Court found that "the only method to evaluate [fetal] lung maturity is by amniocentesis," a procedure that "imposes additional significant health risks for both the pregnant woman and the fetus." 662 F. Supp. 407, 422 (WD Mo. 1987). Yet the medical literature establishes that to require amniocentesis for all abortions after 20 weeks would be contrary to sound medical practice and, moreover, would be useless for the purpose of determining lung maturity until no earlier than between 28 and 30 weeks gestational age. *Ibid.*; see also Brief for American Medical Association et al. as *Amici Curiae* 41. Thus, were § 188.029 read to require a finding of lung maturity, it would require physicians to perform a highly intrusive procedure of risk that would yield no result relevant to the question of viability.

the plurality's tortured effort to avoid the plain import of § 188.029, it could have struck down the testing provision as patently irrational irrespective of the *Roe* framework.[4]

The plurality eschews this straightforward resolution, in the hope of precipitating a constitutional crisis. Far from avoiding constitutional difficulty, the plurality attempts to engineer a dramatic retrenchment in our jurisprudence by exaggerating the conflict between its untenable construction of § 188.029 and the *Roe* trimester framework.

No one contests that under the *Roe* framework the State, in order to promote its interest in potential human life, may regulate and even proscribe nontherapeutic abortions once the fetus becomes viable. *Roe*, 410 U. S., at 164–165. If, as the plurality appears to hold, the testing provision simply requires a physician to use appropriate and medically sound tests to determine whether the fetus is actually viable when the estimated gestational age is greater than 20 weeks (and therefore within what the District Court found to be the margin of error for viability, *ante*, at 515–516), then I see little or no conflict with *Roe*.[5] Nothing in *Roe*, or any of its progeny, holds that a State may not effectuate its compelling interest in the potential life of a viable fetus by seeking to ensure that no viable fetus is mistakenly aborted because of the inherent lack of precision in estimates of gestational age. A requirement that a physician make a finding of viability, one way or

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[4] I also agree with the Court of Appeals, 851 F. 2d, at 1074–1075, that, as written, § 188.029 is contrary to this Court's decision in *Colautti* v. *Franklin*, 439 U. S. 379, 388–389 (1979).

[5] The plurality never states precisely its construction of § 188.029. I base my synopsis of the plurality's views mainly on its assertion that the entire provision must be read in light of its requirement that the physician act only in accordance with reasonable professional judgment, and that the provision imposes no requirement that a physician perform irrelevant or dangerous tests. *Ante*, at 514–515. To the extent that the plurality may be reading the provision to require tests other than those that a doctor, exercising reasonable professional judgment, would deem necessary to a finding of viability, the provision bears no rational relation to a legitimate governmental interest, and cannot stand.

the other, for every fetus that falls within the range of possible viability does no more than preserve the State's recognized authority. Although, as the plurality correctly points out, such a testing requirement would have the effect of imposing additional costs on second-trimester abortions where the tests indicated that the fetus was not viable, these costs would be merely incidental to, and a necessary accommodation of, the State's unquestioned right to prohibit nontherapeutic abortions after the point of viability. In short, the testing provision, as construed by the plurality, is consistent with the *Roe* framework and could be upheld effortlessly under current doctrine.[6]

How ironic it is, then, and disingenuous, that the plurality scolds the Court of Appeals for adopting a construction of the statute that fails to avoid constitutional difficulties. *Ante*, at

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[6] As convincingly demonstrated by JUSTICE O'CONNOR, *ante*, at 527–531, the cases cited by the plurality, are not to the contrary. As noted by the plurality, in both *Colautti* v. *Franklin*, 439 U. S., at 388–389, and *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52 (1976), we stressed that the determination of viability is a matter for the judgment of the responsible attending physician. But § 188.029, at least as construed by the plurality, is consistent with this requirement. The provision does nothing to remove the determination of viability from the purview of the attending physician; it merely instructs the physician to make a finding of viability using tests to determine gestational age, weight, and lung maturity when such tests are feasible and medically appropriate.

I also see no conflict with the Court's holding in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983), that the State may not impose "a heavy, *and unnecessary*, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." *Id.*, at 438 (emphasis added). In *Akron*, we invalidated a city ordinance requiring that all second-trimester abortions be performed in acute-care hospitals on the ground that such a requirement was not medically necessary and would double the cost of abortions. *Id.*, at 434–439. By contrast, the viability determination at issue in this case (as read by the plurality), is necessary to the effectuation of the State's compelling interest in the potential human life of viable fetuses and applies not to all second-trimester abortions, but instead only to that small percentage of abortions performed on fetuses estimated to be of more than 20 weeks gestational age.

514, 515. By distorting the statute, the plurality manages to avoid invalidating the testing provision on what should have been noncontroversial constitutional grounds; having done so, however, the plurality rushes headlong into a much deeper constitutional thicket, brushing past an obvious basis for upholding § 188.029 in search of a pretext for scuttling the trimester framework. Evidently, from the plurality's perspective, the real problem with the Court of Appeals' construction of § 188.029 is not that it raised a constitutional difficulty, but that it raised the wrong constitutional difficulty—one not implicating *Roe*. The plurality has remedied that, traditional canons of construction and judicial forbearance notwithstanding.

B

Having set up the conflict between § 188.029 and the *Roe* trimester framework, the plurality summarily discards *Roe*'s analytic core as "'unsound in principle and unworkable in practice.'" *Ante*, at 518, quoting *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 546 (1985). This is so, the plurality claims, because the key elements of the framework do not appear in the text of the Constitution, because the framework more closely resembles a regulatory code than a body of constitutional doctrine, and because under the framework the State's interest in potential human life is considered compelling only after viability, when, in fact, that interest is equally compelling throughout pregnancy. *Ante*, at 519–520. The plurality does not bother to explain these alleged flaws in *Roe*. Bald assertion masquerades as reasoning. The object, quite clearly, is not to persuade, but to prevail.

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The plurality opinion is far more remarkable for the arguments that it does not advance than for those that it does. The plurality does not even mention, much less join, the true jurisprudential debate underlying this case: whether the Constitution includes an "unenumerated" general right to

privacy as recognized in many of our decisions, most notably *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), and *Roe*, and, more specifically, whether, and to what extent, such a right to privacy extends to matters of childbearing and family life, including abortion. See, *e. g.*, *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972) (contraception); *Loving* v. *Virginia*, 388 U. S. 1 (1967) (marriage); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942) (procreation); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925) (childrearing).[7] These are questions of unsurpassed significance in this Court's interpretation of the Constitution, and mark the battleground upon which this case was fought, by the parties, by the United States as *amicus* on behalf of petitioners, and by an unprecedented number of *amici*. On these grounds, abandoned by the plurality, the Court should decide this case.

But rather than arguing that the text of the Constitution makes no mention of the right to privacy, the plurality complains that the critical elements of the *Roe* framework—tri-

[7] The plurality, ignoring all of the aforementioned cases except *Griswold*, responds that this case does not require consideration of the "great issues" underlying this case because *Griswold*, "unlike *Roe*, did not purport to adopt a whole framework . . . to govern the cases in which the asserted liberty interest would apply." *Ante*, at 520. This distinction is highly ironic. The Court in *Roe* adopted the framework of which the plurality complains as a mechanism necessary to give effect both to the constitutional rights of the pregnant woman and to the State's significant interests in maternal health and potential life. Concededly, *Griswold* does not adopt a framework for determining the permissible scope of state regulation of contraception. The reason is simple: in *Griswold* (and *Eisenstadt*), the Court held that the challenged statute, regulating the use of medically safe contraception, did not properly serve *any* significant state interest. Accordingly, the Court had no occasion to fashion a framework to accommodate a State's interests in regulating contraception. Surely, the plurality is not suggesting that it would find *Roe* unobjectionable if the Court had forgone the framework and, as in the contraception decisions, had left the State with little or no regulatory authority. The plurality's focus on the framework is merely an excuse for avoiding the real issues embedded in this case and a mask for its hostility to the constitutional rights that *Roe* recognized.

mesters and viability—do not appear in the Constitution and are, therefore, somehow inconsistent with a Constitution cast in general terms. *Ante*, at 518–519. Were this a true concern, we would have to abandon most of our constitutional jurisprudence. As the plurality well knows, or should know, the "critical elements" of countless constitutional doctrines nowhere appear in the Constitution's text. The Constitution makes no mention, for example, of the First Amendment's "actual malice" standard for proving certain libels, see *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), or of the standard for determining when speech is obscene. See *Miller* v. *California*, 413 U. S. 15 (1973). Similarly, the Constitution makes no mention of the rational-basis test, or the specific verbal formulations of intermediate and strict scrutiny by which this Court evaluates claims under the Equal Protection Clause. The reason is simple. Like the *Roe* framework, these tests or standards are not, and do not purport to be, rights protected by the Constitution. Rather, they are judge-made methods for evaluating and measuring the strength and scope of constitutional rights or for balancing the constitutional rights of individuals against the competing interests of government.

With respect to the *Roe* framework, the general constitutional principle, indeed the fundamental constitutional right, for which it was developed is the right to privacy, see, *e. g.*, *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), a species of "liberty" protected by the Due Process Clause, which under our past decisions safeguards the right of women to exercise some control over their own role in procreation. As we recently reaffirmed in *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986), few decisions are "more basic to individual dignity and autonomy" or more appropriate to that "certain private sphere of individual liberty" that the Constitution reserves from the intrusive reach of government than the right to make the uniquely personal, intimate, and self-defining decision whether to end

a pregnancy. *Id.*, at 772. It is this general principle, the "'moral fact that a person belongs to himself and not others nor to society as a whole,'" *id.*, at 777, n. 5 (STEVENS, J., concurring), quoting Fried, Correspondence, 6 Phil. & Pub. Aff. 288–289 (1977), that is found in the Constitution. See *Roe*, 410 U. S., at 152–153. The trimester framework simply defines and limits that right to privacy in the abortion context to accommodate, not destroy, a State's legitimate interest in protecting the health of pregnant women and in preserving potential human life. *Id.*, at 154–162. Fashioning such accommodations between individual rights and the legitimate interests of government, establishing benchmarks and standards with which to evaluate the competing claims of individuals and government, lies at the very heart of constitutional adjudication. To the extent that the trimester framework is useful in this enterprise, it is not only consistent with constitutional interpretation, but necessary to the wise and just exercise of this Court's paramount authority to define the scope of constitutional rights.

2

The plurality next alleges that the result of the trimester framework has "been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine." *Ante*, at 518. Again, if this were a true and genuine concern, we would have to abandon vast areas of our constitutional jurisprudence. The plurality complains that under the trimester framework the Court has distinguished between a city ordinance requiring that second-trimester abortions be performed in clinics and a state law requiring that these abortions be performed in hospitals, or between laws requiring that certain information be furnished to a woman by a physician or his assistant and those requiring that such information be furnished by the physician exclusively. *Ante*, at 518, n. 15, citing *Simopoulos* v. *Virginia*, 462 U. S. 506 (1983),

and *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983). Are these distinctions any finer, or more "regulatory," than the distinctions we have often drawn in our First Amendment jurisprudence, where, for example, we have held that a "release time" program permitting public-school students to leave school grounds during school hours to receive religious instruction does not violate the Establishment Clause, even though a release-time program permitting religious instruction on school grounds does violate the Clause? Compare *Zorach* v. *Clauson*, 343 U. S. 306 (1952), with *Illinois ex rel. McCollum* v. *Board of Education of School Dist. No. 71, Champaign County*, 333 U. S. 203 (1948). Our Fourth Amendment jurisprudence recognizes factual distinctions no less intricate. Just this Term, for example, we held that while an aerial observation from a helicopter hovering at 400 feet does not violate any reasonable expectation of privacy, such an expectation of privacy would be violated by a helicopter observation from an unusually low altitude. *Florida* v. *Riley*, 488 U. S. 445, 451 (1989) (O'CONNOR, J., concurring in judgment). Similarly, in a Sixth Amendment case, the Court held that although an overnight ban on attorney-client communication violated the constitutionally guaranteed right to counsel, *Geders* v. *United States*, 425 U. S. 80 (1976), that right was not violated when a trial judge separated a defendant from his lawyer during a 15-minute recess after the defendant's direct testimony. *Perry* v. *Leeke*, 488 U. S. 272 (1989).

That numerous constitutional doctrines result in narrow differentiations between similar circumstances does not mean that this Court has abandoned adjudication in favor of regulation. Rather, these careful distinctions reflect the process of constitutional adjudication itself, which is often highly fact specific, requiring such determinations as whether state laws are "unduly burdensome" or "reasonable" or bear a "rational" or "necessary" relation to asserted state interests. In a recent due process case, THE CHIEF JUSTICE wrote for the

Court: "[M]any branches of the law abound in nice distinctions that may be troublesome but have been thought nonetheless necessary: 'I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized.'" *Daniels* v. *Williams*, 474 U. S. 327, 334 (1986), quoting *LeRoy Fibre Co.* v. *Chicago, M. & St. P. R. Co.*, 232 U. S. 340, 354 (1914) (Holmes, J., partially concurring).

These "differences of degree" fully account for our holdings in *Simopoulos*, *supra*, and *Akron*, *supra*. Those decisions rest on this Court's reasoned and accurate judgment that hospitalization and doctor-counseling requirements unduly burdened the right of women to terminate a pregnancy and were not rationally related to the State's asserted interest in the health of pregnant women, while Virginia's *substantially less restrictive* regulations were not unduly burdensome and did rationally serve the State's interest.[8] That the Court exercised its best judgment in evaluating these markedly different statutory schemes no more established the Court as an "'*ex officio* medical board,'" *ante*, at 519, quoting *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 99 (1976) (opinion of WHITE, J., concurring in part and dissenting in part), than our decisions involving religion in the public schools establish the Court as a national school board, or our decisions concerning prison regulations establish the Court as

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[8] The difference in the *Akron* and *Simopoulos* regulatory regimes is stark. The Court noted in *Akron* that the city ordinance requiring that all second-trimester abortions be performed in acute-care hospitals undoubtedly would have made the procurement of legal abortions difficult and often prohibitively expensive, thereby driving the performance of abortions back underground where they would not be subject to effective regulation. Such a requirement obviously did not further the city's asserted interest in maternal health. 462 U. S., at 420, n. 1. On the other hand, the Virginia law at issue in *Simopoulos*, by permitting the performance of abortions in licensed out-patient clinics as well as hospitals, did not similarly constrict the availability of legal abortions and, therefore, did not undermine its own stated purpose of protecting maternal health.

a bureau of prisons. See *Thornburgh* v. *Abbott*, 490 U. S. 401 (1989) (adopting different standard of First Amendment review for incoming as opposed to outgoing prison mail). If, in delicate and complicated areas of constitutional law, our legal judgments "have become increasingly intricate," *ante*, at 518, it is not, as the plurality contends, because we have overstepped our judicial role. Quite the opposite: the rules are intricate because we have remained conscientious in our duty to do justice carefully, especially when fundamental rights rise or fall with our decisions.

3

Finally, the plurality asserts that the trimester framework cannot stand because the State's interest in potential life is compelling throughout pregnancy, not merely after viability. *Ante*, at 519. The opinion contains not one word of rationale for its view of the State's interest. This "it-is-so-because-we-say-so" jurisprudence constitutes nothing other than an attempted exercise of brute force; reason, much less persuasion, has no place.

In answering the plurality's claim that the State's interest in the fetus is uniform and compelling throughout pregnancy, I cannot improve upon what JUSTICE STEVENS has written:

> "I should think it obvious that the State's interest in the protection of an embryo—even if that interest is defined as 'protecting those who will be citizens' . . . —increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day. The development of a fetus—and pregnancy itself—are not static conditions, and the assertion that the government's interest is static simply ignores this reality. . . . [U]nless the religious view that a fetus is a 'person' is adopted . . . there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if

> there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures. And if distinctions may be drawn between a fetus and a human being in terms of the state interest in their protection—even though the fetus represents one of 'those who will be citizens'—it seems to me quite odd to argue that distinctions may not also be drawn between the state interest in protecting the freshly fertilized egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth. Recognition of this distinction is supported not only by logic, but also by history and by our shared experiences." *Thornburgh*, 476 U. S., at 778–779 (footnote omitted).

See also *Roe*, 410 U. S., at 129–147.

For my own part, I remain convinced, as six other Members of this Court 16 years ago were convinced, that the *Roe* framework, and the viability standard in particular, fairly, sensibly, and effectively functions to safeguard the constitutional liberties of pregnant women while recognizing and accommodating the State's interest in potential human life. The viability line reflects the biological facts and truths of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman. At the same time, the viability standard takes account of the undeniable fact that as the fetus evolves into its postnatal form, and as it loses its dependence on the uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling. As a practical matter, because viability follows "quickening"—the point at which a woman feels movement in her womb—and because viability occurs no earlier than 23 weeks gestational age, it establishes an easily applicable standard for regulating abortion while

providing a pregnant woman ample time to exercise her fundamental right with her responsible physician to terminate her pregnancy.[9] Although I have stated previously for a majority of this Court that "[c]onstitutional rights do not always have easily ascertainable boundaries," to seek and establish those boundaries remains the special responsibility of this Court. *Thornburgh*, 476 U. S., at 771. In *Roe*, we discharged that responsibility as logic and science compelled. The plurality today advances not one reasonable argument as to why our judgment in that case was wrong and should be abandoned.

C

Having contrived an opportunity to reconsider the *Roe* framework, and then having discarded that framework, the plurality finds the testing provision unobjectionable because it "permissibly furthers the State's interest in protecting potential human life." *Ante*, at 519–520. This newly minted

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[9] Notably, neither the plurality nor JUSTICE O'CONNOR advances the now-familiar catch-phrase criticism of the *Roe* framework that because the point of viability will recede with advances in medical technology, *Roe* "is clearly on a collision course with itself." See *Akron*, 462 U. S., at 458 (dissenting opinion). This critique has no medical foundation. As the medical literature and the *amicus* briefs filed in this case conclusively demonstrate, "there is an 'anatomic threshold' for fetal viability of about 23–24 weeks of gestation." Brief for American Medical Association et al. as *Amici Curiae* 7. See also Brief for 167 Distinguished Scientists and Physicians, including 11 Nobel Laureates, as *Amici Curiae* 8–14. Prior to that time, the crucial organs are not sufficiently mature to provide the mutually sustaining functions that are prerequisite to extrauterine survival, or viability. Moreover, "no technology exists to bridge the development gap between the three-day embryo culture and the 24th week of gestation." Fetal Extrauterine Survivability, Report to the New York State Task Force on Life and the Law 3 (1988). Nor does the medical community believe that the development of any such technology is possible in the foreseeable future. *Id.*, at 12. In other words, the threshold of fetal viability is, and will remain, no different from what it was at the time *Roe* was decided. Predictions to the contrary are pure science fiction. See Brief for A Group of American Law Professors as *Amici Curiae* 23–25.

standard is circular and totally meaningless. Whether a challenged abortion regulation "permissibly furthers" a legitimate state interest is the *question* that courts must answer in abortion cases, not the standard for courts to apply. In keeping with the rest of its opinion, the plurality makes no attempt to explain or to justify its new standard, either in the abstract or as applied in this case. Nor could it. The "permissibly furthers" standard has no independent meaning, and consists of nothing other than what a majority of this Court may believe at any given moment in any given case. The plurality's novel test appears to be nothing more than a dressed-up version of rational-basis review, this Court's most lenient level of scrutiny. One thing is clear, however: were the plurality's "permissibly furthers" standard adopted by the Court, for all practical purposes, *Roe* would be overruled.[10]

The "permissibly furthers" standard completely disregards the irreducible minimum of *Roe:* the Court's recognition that a woman has a limited fundamental constitutional right to decide whether to terminate a pregnancy. That right receives no meaningful recognition in the plurality's written opinion. Since, in the plurality's view, the State's interest in potential life is compelling as of the moment of conception, and is therefore served only if abortion is abolished, every hindrance to a woman's ability to obtain an abortion must be "permissible." Indeed, the more severe the hindrance, the more effectively (and permissibly) the State's interest would be furthered. A tax on abortions or a criminal prohibition would both satisfy the plurality's standard. So, for that

[10] Writing for the Court in *Akron*, Justice Powell observed the same phenomenon, though in hypothetical response to the dissent in that case: "In sum, it appears that the dissent would uphold virtually any abortion regulation under a rational-basis test. It also appears that even where heightened scrutiny is deemed appropriate, the dissent would uphold virtually any abortion-inhibiting regulation because of the State's interest in preserving potential human life. . . . This analysis is wholly incompatible with the existence of the fundamental right recognized in *Roe* v. *Wade*." 462 U. S., at 420–421, n. 1.

matter, would a requirement that a pregnant woman memorize and recite today's plurality opinion before seeking an abortion.

The plurality pretends that *Roe* survives, explaining that the facts of this case differ from those in *Roe:* here, Missouri has chosen to assert its interest in potential life only at the point of viability, whereas, in *Roe*, Texas had asserted that interest from the point of conception, criminalizing all abortions, except where the life of the mother was at stake. *Ante*, at 521. This, of course, is a distinction without a difference. The plurality repudiates every principle for which *Roe* stands; in good conscience, it cannot possibly believe that *Roe* lies "undisturbed" merely because this case does not call upon the Court to reconsider the Texas statute, or one like it. If the Constitution permits a State to enact any statute that reasonably furthers its interest in potential life, and if that interest arises as of conception, why would the Texas statute fail to pass muster? One suspects that the plurality agrees. It is impossible to read the plurality opinion and especially its final paragraph, without recognizing its implicit invitation to every State to enact more and more restrictive abortion laws, and to assert their interest in potential life as of the moment of conception. All these laws will satisfy the plurality's nonscrutiny, until sometime, a new regime of old dissenters and new appointees will declare what the plurality intends: that *Roe* is no longer good law.[11]

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[11] The plurality claims that its treatment of *Roe*, and a woman's right to decide whether to terminate a pregnancy, "hold[s] true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not." *Ante*, at 521. This is unadulterated nonsense. The plurality's balance matches a lead weight (the State's allegedly compelling interest in fetal life as of the moment of conception) against a feather (a "liberty interest" of the pregnant woman that the plurality barely mentions, much less describes). The plurality's balance—no balance at all—places nothing, or virtually nothing, beyond the reach of the democratic process.

JUSTICE SCALIA candidly argues that this is all for the best. *Ante*, at 532. I cannot agree. "The very purpose of a Bill of Rights was to with-

D

Thus, "not with a bang, but a whimper," the plurality discards a landmark case of the last generation, and casts into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children. The plurality does so either oblivious or insensitive to the fact that millions of women, and their families, have ordered their lives around the right to reproductive choice, and that this right has become vital to the full participation of women in the economic and political walks of American life. The plurality would clear the way once again for government to force upon women the physical labor and specific and direct medical and psychological harms that may accompany carrying a fetus to term. The plurality would clear the way again for the State to conscript a woman's body and to force upon her a "distressful life and future." *Roe*, 410 U. S., at 153.

The result, as we know from experience, see Cates & Rochat, Illegal Abortions in the United States: 1972–1974, 8 Family Planning Perspectives 86, 92 (1976), would be that every year hundreds of thousands of women, in desperation, would defy the law, and place their health and safety in the unclean and unsympathetic hands of back-alley abortionists, or they would attempt to perform abortions upon themselves,

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draw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property . . . may not be submitted to vote; they depend on the outcome of no elections." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943). In a Nation that cherishes liberty, the ability of a woman to control the biological operation of her body and to determine with her responsible physician whether or not to carry a fetus to term must fall within that limited sphere of individual autonomy that lies beyond the will or the power of any transient majority. This Court stands as the ultimate guarantor of that zone of privacy, regardless of the bitter disputes to which our decisions may give rise. In *Roe*, and our numerous cases reaffirming *Roe*, we did no more than discharge our constitutional duty.

with disastrous results. Every year, many women, especially poor and minority women, would die or suffer debilitating physical trauma, all in the name of enforced morality or religious dictates or lack of compassion, as it may be.

Of the aspirations and settled understandings of American women, of the inevitable and brutal consequences of what it is doing, the tough-approach plurality utters not a word. This silence is callous. It is also profoundly destructive of this Court as an institution. To overturn a constitutional decision is a rare and grave undertaking. To overturn a constitutional decision that secured a fundamental personal liberty to millions of persons would be unprecedented in our 200 years of constitutional history. Although the doctrine of *stare decisis* applies with somewhat diminished force in constitutional cases generally, *ante*, at 518, even in ordinary constitutional cases "any departure from . . . *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). See also *Vasquez* v. *Hillery*, 474 U. S. 254, 266 (1986) ("[T]he careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained,'" quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 412 (1932) (Brandeis, J., dissenting)). This requirement of justification applies with unique force where, as here, the Court's abrogation of precedent would destroy people's firm belief, based on past decisions of this Court, that they possess an unabridgeable right to undertake certain conduct.[12]

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[12] Cf. *South Carolina* v. *Gathers*, 490 U. S. 805, 824 (1989) (SCALIA, J., dissenting) ("[T]he respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised on their validity").

Moreover, as Justice Powell wrote for the Court in *Akron:* "There are especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe* v. *Wade*. That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive

As discussed at perhaps too great length above, the plurality makes no serious attempt to carry "the heavy burden of persuading . . . that changes in society or in the law dictate" the abandonment of *Roe* and its numerous progeny, *Vasquez*, 474 U. S., at 266, much less the greater burden of explaining the abrogation of a fundamental personal freedom. Instead, the plurality pretends that it leaves *Roe* standing, and refuses even to discuss the real issue underlying this case: whether the Constitution includes an unenumerated right to privacy that encompasses a woman's right to decide whether to terminate a pregnancy. To the extent that the plurality does criticize the *Roe* framework, these criticisms are pure *ipse dixit*.

This comes at a cost. The doctrine of *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." 474 U. S., at 265–266. Today's decision involves the most politically divisive domestic legal issue of our time. By refusing to explain or to justify its proposed revolutionary revision in the law of abortion, and by refusing to abide not only by our precedents, but also by our canons for reconsidering those precedents, the plurality invites charges of cowardice and

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briefing—the following Term. The decision was joined by THE CHIEF JUSTICE and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy." 462 U. S., at 420, n. 1. See, *e. g.*, *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52 (1976); *Bellotti* v. *Baird*, 428 U. S. 132 (1976); *Beal* v. *Doe*, 432 U. S. 438 (1977); *Maher* v. *Roe*, 432 U. S. 464 (1977); *Colautti* v. *Franklin*, 439 U. S. 379 (1979); *Bellotti* v. *Baird*, 443 U. S. 622 (1979); *Harris* v. *McRae*, 448 U. S. 297 (1980); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983); *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986).

illegitimacy to our door. I cannot say that these would be undeserved.

II

For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.

JUSTICE STEVENS, concurring in part and dissenting in part.

Having joined Part II–C of the Court's opinion, I shall not comment on § 188.205 of the Missouri statute. With respect to the challenged portions of §§ 188.210 and 188.215, I agree with JUSTICE BLACKMUN, *ante*, at 539–541, n. 1 (concurring in part and dissenting in part), that the record identifies a sufficient number of unconstitutional applications to support the Court of Appeals' judgment invalidating those provisions. The reasons why I would also affirm that court's invalidation of § 188.029, the viability testing provision, and §§ 1.205.1(1), (2) of the preamble,[1] require separate explanation.

I

It seems to me that in Part II–D of its opinion, the plurality strains to place a construction on § 188.029[2] that enables

[1] The State prefers to refer to subsections (1) and (2) of § 1.205.1 as "prefatory statements with no substantive effect." Brief for Appellants 9; see *id.*, at 21; see also 851 F. 2d 1071, 1076 (CA8 1988). It is true that § 1.205 is codified in Chapter 1, Laws in Force and Construction of Statutes, of Title I, Laws and Statutes, of the Missouri Revised Statutes, while all other provisions at issue are codified in Chapter 188, Regulation of Abortions, of Title XII, Public Health and Welfare. But because § 1.205 appeared at the beginning of House Bill No. 1596, see *ante*, at 500–501, it is entirely appropriate to consider it as a preamble relevant to those regulations.

[2] The testing provision states:

"188.029. Physician, determination of viability, duties

"Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational

it to conclude: "[W]e would modify and narrow *Roe* and succeeding cases," *ante*, at 521. That statement is ill advised because there is no need to modify even slightly the holdings of prior cases in order to uphold § 188.029. For the most plausible nonliteral construction, as both JUSTICE BLACKMUN, *ante*, at 542–544 (concurring in part and dissenting in part), and JUSTICE O'CONNOR, *ante*, at 525–531 (concurring in part and concurring in judgment), have demonstrated, is constitutional and entirely consistent with our precedents.

I am unable to accept JUSTICE O'CONNOR's construction of the second sentence in § 188.029, however, because I believe it is foreclosed by two controlling principles of statutory interpretation. First, it is our settled practice to accept "the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop* v. *Wood*, 426 U. S. 341, 346 (1976).[3] Second, "[t]he fact that a particular application of the clear terms of a statute might be unconstitutional does not provide us with a justification for ignoring the plain meaning of the statute." *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 481 (1989) (KENNEDY, J., concur-

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age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother." Mo. Rev. Stat. § 188.029 (1986).

[3] See also *United States* v. *Durham Lumber Co.*, 363 U. S. 522, 526–527 (1960); *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949); *Hillsborough* v. *Cromwell*, 326 U. S. 620, 630 (1946); *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1944); *MacGregor* v. *State Mutual Life Ins. Co.*, 315 U. S. 280, 281 (1942) *(per curiam)*.

ring in judgment).[4] In this case, I agree with the Court of Appeals, 851 F. 2d 1071, 1074–1075 (CA8 1988), and the District Court, 662 F. Supp. 407, 423 (WD Mo. 1987), that the meaning of the second sentence of § 188.029 is too plain to be ignored. The sentence twice uses the mandatory term "shall," and contains no qualifying language. If it is implicitly limited to tests that are useful in determining viability, it adds nothing to the requirement imposed by the preceding sentence.

My interpretation of the plain language is supported by the structure of the statute as a whole, particularly the preamble, which "finds" that life "begins at conception" and further commands that state laws shall be construed to provide the maximum protection to "the unborn child at every stage of development." Mo. Rev. Stat. §§ 1.205.1(1), 1.205.2 (1986). I agree with the District Court that "[o]bviously, the purpose of this law is to protect the potential life of the fetus, rather than to safeguard maternal health." 662 F. Supp., at 420. A literal reading of the statute tends to accomplish that goal. Thus it is not "incongruous," *ante*, at 515, to assume that the Missouri Legislature was trying to protect the potential human life of nonviable fetuses by making the abortion decision more costly.[5] On the contrary, I am satisfied that the Court of Appeals, as well as the District Court, correctly concluded that the Missouri Legislature meant exactly what it said in the second sentence of § 188.029. I am also satisfied,

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[4] We have stated that we will interpret a federal statute to avoid serious constitutional problems if "a reasonable alternative interpretation poses no constitutional question," *Gomez* v. *United States*, 490 U. S. 858, 864 (1989), or if "it is fairly possible to interpret the statute in a manner that renders it constitutionally valid," *Communications Workers* v. *Beck*, 487 U. S. 735, 762 (1988), or "unless such construction is plainly contrary to the intent of Congress," *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building and Construction Trades Council*, 485 U. S. 568, 575 (1988).

[5] As with the testing provision, the plurality opts for a construction of this statute that conflicts with those of the Court of Appeals, 851 F. 2d, at 1076–1077, and the District Court, 662 F. Supp. 407, 413 (WD Mo. 1987).

for the reasons stated by JUSTICE BLACKMUN, that the testing provision is manifestly unconstitutional under *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955), "irrespective of the *Roe* [v. *Wade*, 410 U. S. 113 (1973),] framework." *Ante*, at 544 (concurring in part and dissenting in part).

II

The Missouri statute defines "conception" as "the fertilization of the ovum of a female by a sperm of a male," Mo. Rev. Stat. § 188.015(3) (1986), even though standard medical texts equate "conception" with implantation in the uterus, occurring about six days after fertilization.[6] Missouri's declaration therefore implies regulation not only of previability abortions, but also of common forms of contraception such as the IUD and the morning-after pill.[7] Because the preamble, read in context, threatens serious encroachments upon the liberty of the pregnant woman and the health professional, I am persuaded that these plaintiffs, appellees before us, have

[6] The fertilized egg remains in the woman's Fallopian tube for 72 hours, then travels to the uterus' cavity, where cell division continues for another 72 hours before implantation in the uterine wall. D. Mishell & V. Davajan, Infertility, Contraception and Reproductive Endocrinology 109–110 (2d ed. 1986); see also Brief for Association of Reproductive Health Professionals et al. as *Amici Curiae* 31–32 (ARHP Brief) (citing, *inter alia*, J. Pritchard, P. MacDonald, & N. Gant, Williams Obstetrics 88–91 (17th ed. 1985)). "[O]nly 50 per cent of fertilized ova ultimately become implanted." ARHP Brief 32, n. 25 (citing Post Coital Contraception, The Lancet 856 (Apr. 16, 1983)).

[7] An intrauterine device, commonly called an IUD, "works primarily by preventing a fertilized egg from implanting." Burnhill, Intrauterine Contraception, in Fertility Control 271, 280 (S. Corson, R. Derman, & L. Tyrer eds. 1985). See also 21 CFR § 801.427, p. 32 (1988); ARHP Brief 34–35. Other contraceptive methods that may prevent implantation include "morning-after pills," high-dose estrogen pills taken after intercourse, particularly in cases of rape, ARHP Brief 33, and the French RU 486, a pill that works "during the indeterminate period between contraception and abortion," *id.*, at 37. Low-level estrogen "combined" pills—a version of the ordinary, daily ingested birth control pill—also may prevent the fertilized egg from reaching the uterine wall and implanting. *Id.*, at 35–36.

standing to challenge its constitutionality. Accord, 851 F. 2d, at 1075–1076.

To the extent that the Missouri statute interferes with contraceptive choices, I have no doubt that it is unconstitutional under the Court's holdings in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); and *Carey* v. *Population Services International*, 431 U. S. 678 (1977). The place of *Griswold* in the mosaic of decisions defining a woman's liberty interest was accurately stated by Justice Stewart in his concurring opinion in *Roe* v. *Wade*, 410 U. S. 113, 167–170 (1973):

> "[I]n *Griswold* v. *Connecticut*, 381 U. S. 479, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in [*Ferguson* v.] *Skrupa*, [372 U. S. 726 (1963),] the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. So it was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the 'liberty' that is protected by the Due Process Clause of the Fourteenth Amendment. As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.
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> . . . . .
>
> "Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Loving* v. *Virginia*, 388 U. S. 1, 12 [(1967)]; *Griswold* v. *Connecticut*, *supra*; *Pierce* v. *Society of Sisters*, [268 U. S. 510 (1925)]; *Meyer* v. *Nebraska*, [262 U. S. 390 (1923)]. See also

> *Prince* v. *Massachusetts*, 321 U. S. 158, 166 [(1944)]; *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 [(1942)]. As recently as last Term, in *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 [(1972)], we recognized 'the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.' That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. 'Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in Pierce v. Society of Sisters, 268 U. S. 510 (1925), or the right to teach a foreign language protected in Meyer v. Nebraska, 262 U. S. 390 (1923).' *Abele* v. *Markle*, 351 F. Supp. 224, 227 (Conn. 1972).
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> "Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment." (Emphasis in original; footnotes omitted.)[8]

One might argue that the *Griswold* holding applies to devices "preventing conception," 381 U. S., at 480—that is, fertilization—but not to those preventing implantation, and therefore, that *Griswold* does not protect a woman's choice to use an IUD or take a morning-after pill. There is unques-

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[8] The contrast between Justice Stewart's careful explication that our abortion precedent flowed naturally from a stream of substantive due process cases and JUSTICE SCALIA's notion that our abortion law was "constructed overnight in *Roe* v. *Wade*," *ante*, at 537 (concurring in part and concurring in judgment), is remarkable.

tionably a theological basis for such an argument,[9] just as there was unquestionably a theological basis for the Connecticut statute that the Court invalidated in *Griswold*. Our jurisprudence, however, has consistently required a secular basis for valid legislation. See, *e. g.*, *Stone* v. *Graham*, 449 U. S. 39, 40 (1980) *(per curiam)*.[10] Because I am not aware of any secular basis for differentiating between contraceptive procedures that are effective immediately before and those that are effective immediately after fertilization, I believe it inescapably follows that the preamble to the Missouri statute is invalid under *Griswold* and its progeny.

Indeed, I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution. This conclusion does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions, see *McGowan* v. *Maryland*, 366 U. S. 420, 442 (1961); *Harris* v. *McRae*, 448 U. S. 297, 319–320 (1980), or on the fact that the legislators who voted to enact it may have been motivated by religious considerations, see *Washington* v. *Davis*, 426 U. S. 229, 253 (1976) (STEVENS, J., concurring). Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths,[11] serves no iden-

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[9] Several *amici* state that the "sanctity of human life from conception and opposition to abortion are, in fact, sincere and deeply held religious beliefs," Brief for Lutheran Church-Missouri Synod et al. as *Amici Curiae* 20 (on behalf of 49 "church denominations"); see Brief for Holy Orthodox Church as *Amicus Curiae* 12–14.

[10] The dissent in *Stone* did not dispute this proposition; rather, it argued that posting the Ten Commandments on schoolroom walls has a secular purpose. 449 U. S., at 43–46 (REHNQUIST, J., dissenting).

[11] See, *e. g.*, Brief for Catholics for a Free Choice et al. as *Amici Curiae* 5 ("There is no constant teaching in Catholic theology on the commencement of personhood").

tifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause.[12] *Wallace* v. *Jaffree*, 472 U. S. 38, 56 (1985).

My concern can best be explained by reference to the position on this issue that was widely accepted by the leaders of the Roman Catholic Church for many years. The position is summarized in a report, entitled "Catholic Teaching On Abortion," prepared by the Congressional Research Service of the Library of Congress. It states in part:

> "The disagreement over the status of the unformed as against the formed fetus was crucial for Christian teaching on the soul. It was widely held that the soul was not present until the formation of the fetus 40 or 80 days after conception, for males and females respectively. Thus, abortion of the 'unformed' or 'inanimate' fetus (from *anima*, soul) was something less than true homicide, rather a form of anticipatory or quasi-homicide. This view received its definitive treatment in St. Thomas Aquinas and became for a time the dominant interpretation in the Latin Church.
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> . . . . .
>
> "For St. Thomas, as for mediaeval Christendom generally, there is a lapse of time—approximately 40 to 80 days—after conception and before the soul's infusion. . . .
>
> "For St. Thomas, 'seed and what is not seed is determined by sensation and movement.' What is destroyed in abortion of the unformed fetus is seed, not man. This distinction received its most careful analysis in St. Thomas. It was the general belief of Christendom, re-

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[12] Pointing to the lack of consensus about life's onset among experts in medicine, philosophy, and theology, the Court in *Roe* v. *Wade*, 410 U. S. 113, 158, 162 (1973), established that the Constitution does not permit a State to adopt a theory of life that overrides a pregnant woman's rights. Accord, *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 444 (1983). The constitutional violation is doubly grave if, as here, the only basis for the State's "finding" is nonsecular.

> flected, for example, in the Council of Trent (1545–1563), which restricted penalties for homicide to abortion of an animated fetus only." C. Whittier, Catholic Teaching on Abortion: Its Origin and Later Development (1981), reprinted in Brief for Americans United for Separation of Church and State as *Amicus Curiae* 13a, 17a (quoting *In octo libros politicorum* 7.12, attributed to St. Thomas Aquinas).

If the views of St. Thomas were held as widely today as they were in the Middle Ages, and if a state legislature were to enact a statute prefaced with a "finding" that female life begins 80 days after conception and male life begins 40 days after conception, I have no doubt that this Court would promptly conclude that such an endorsement of a particular religious tenet is violative of the Establishment Clause.

In my opinion the difference between that hypothetical statute and Missouri's preamble reflects nothing more than a difference in theological doctrine. The preamble to the Missouri statute endorses the theological position that there is the same secular interest in preserving the life of a fetus during the first 40 or 80 days of pregnancy as there is after viability—indeed, after the time when the fetus has become a "person" with legal rights protected by the Constitution.[13] To sustain that position as a matter of law, I believe Missouri has the burden of identifying the secular interests that differentiate the first 40 days of pregnancy from the period im-

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[13] No Member of this Court has ever questioned the holding in *Roe*, 410 U. S., at 156–159, that a fetus is not a "person" within the meaning of the Fourteenth Amendment. Even the dissenters in *Roe* implicitly endorsed that holding by arguing that state legislatures should decide whether to prohibit or to authorize abortions. See *id.*, at 177 (REHNQUIST, J., dissenting) (arguing that the Fourteenth Amendment did not "withdraw from the States the power to legislate with respect to this matter"); *Doe* v. *Bolton*, 410 U. S. 179, 222 (1973) (WHITE, J., dissenting jointly in *Doe* and *Roe*). By characterizing the basic question as "a political issue," see *ante*, at 535 (concurring in part and concurring in judgment), JUSTICE SCALIA likewise implicitly accepts this holding.

mediately before or after fertilization when, as *Griswold* and related cases establish, the Constitution allows the use of contraceptive procedures to prevent potential life from developing into full personhood. Focusing our attention on the first several weeks of pregnancy is especially appropriate because that is the period when the vast majority of abortions are actually performed.

As a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth. There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet exist; respecting a developed fetus, however, that interest is valid. In fact, if one prescinds the theological concept of ensoulment—or one accepts St. Thomas Aquinas' view that ensoulment does not occur for at least 40 days—a State has no greater secular interest in protecting the potential life of an embryo that is still "seed" than in protecting the potential life of a sperm or an unfertilized ovum.

There have been times in history when military and economic interests would have been served by an increase in population. No one argues today, however, that Missouri can assert a societal interest in increasing its population as its secular reason for fostering potential life. Indeed, our national policy, as reflected in legislation the Court upheld last Term, is to prevent the potential life that is produced by "pregnancy and childbirth among unmarried adolescents." *Bowen* v. *Kendrick*, 487 U. S. 589, 593 (1988); accord, *id.*, at 602. If the secular analysis were based on a strict balancing of fiscal costs and benefits, the economic costs of unlimited childbearing would outweigh those of abortion. There is, of course, an important and unquestionably valid secular interest in "protecting a young pregnant woman from the consequences of an incorrect decision," *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 102 (1976)

(STEVENS, J., concurring in part and dissenting in part). Although that interest is served by a requirement that the woman receive medical and, in appropriate circumstances, parental, advice,[14] it does not justify the state legislature's official endorsement of the theological tenet embodied in §§ 1.205.1(1), (2).

The State's suggestion that the "finding" in the preamble to its abortion statute is, in effect, an amendment to its tort, property, and criminal laws is not persuasive. The Court of Appeals concluded that the preamble "is simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations." 851 F. 2d, at 1076. Supporting that construction is the state constitutional prohibition against legislative enactments pertaining to more than one subject matter. Mo. Const., Art. 3, § 23. See *In re Ray*, 83 B. R. 670 (Bkrtcy Ct., ED Mo. 1988); *Berry* v. *Majestic Milling Co.*, 223 S. W. 738 (Mo. 1920). Moreover, none of the tort, property, or criminal law cases cited by the State was either based on or buttressed by a theological answer to the question of when life begins. Rather, the Missouri courts, as well as a number of other state courts, had already concluded that a "fetus is a 'person,' 'minor,' or 'minor child' within the meaning of their particular wrongful death stat-

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[14] "The Court recognizes that the State may insist that the decision not be made without the benefit of medical advice. But since the most significant consequences of the decision are not medical in character, it would seem to me that the State may, with equal legitimacy, insist that the decision be made only after other appropriate counsel has been had as well. Whatever choice a pregnant young woman makes—to marry, to abort, to bear her child out of wedlock—the consequences of her decision may have a profound impact on her entire future life. A legislative determination that such a choice will be made more wisely in most cases if the advice and moral support of a parent play a part in the decisionmaking process is surely not irrational. Moreover, it is perfectly clear that the parental-consent requirement will necessarily involve a parent in the decisional process." *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S., at 103 (STEVENS, J., concurring in part and dissenting in part).

utes." *O'Grady* v. *Brown*, 654 S. W. 2d 904, 910 (Mo. 1983) (en banc).[15]

Bolstering my conclusion that the preamble violates the First Amendment is the fact that the intensely divisive character of much of the national debate over the abortion issue reflects the deeply held religious convictions of many participants in the debate.[16] The Missouri Legislature may not inject its endorsement of a particular religious tradition into this debate, for "[t]he Establishment Clause does not allow public bodies to foment such disagreement." See *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, *post*, at 651 (STEVENS, J., concurring in part and dissenting in part).

In my opinion the preamble to the Missouri statute is unconstitutional for two reasons. To the extent that it has substantive impact on the freedom to use contraceptive procedures, it is inconsistent with the central holding in *Griswold*. To the extent that it merely makes "legislative findings without operative effect," as the State argues, Brief for Appellants 22, it violates the Establishment Clause of the First

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[15] The other examples cited by the State are statutes providing that unborn children are to be treated as though born within the lifetime of the decedent, see Uniform Probate Code § 2–108 (1969), and statutes imposing criminal sanctions in the nature of manslaughter for the killing of a viable fetus or unborn quick child, see, *e. g.*, Ark. Stat. Ann. § 41–2223 (1947). None of the cited statutes included any "finding" on the theological question of when life begins.

[16] No fewer than 67 religious organizations submitted their views as *amici curiae* on either side of this case. *Amici* briefs on both sides, moreover, frankly discuss the relation between the abortion controversy and religion. See generally, *e. g.*, Brief for Agudath Israel of America as *Amicus Curiae*, Brief for Americans United for Separation of Church and State et al. as *Amici Curiae*, Brief for Catholics for a Free Choice et al. as *Amici Curiae*, Brief for Holy Orthodox Church as *Amicus Curiae*, Brief for Lutheran Church-Missouri Synod et al. as *Amici Curiae*, Brief for Missouri Catholic Conference as *Amicus Curiae*. Cf. Burke, Religion and Politics in the United States, in Movements and Issues in World Religions 243, 254–256 (C. Fu & G. Spiegler eds. 1987).

Amendment. Contrary to the theological "finding" of the Missouri Legislature, a woman's constitutionally protected liberty encompasses the right to act on her own belief that—to paraphrase St. Thomas Aquinas—until a seed has acquired the powers of sensation and movement, the life of a human being has not yet begun.[17]

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[17] "Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among 'religions'—to encompass intolerance of the disbeliever and the uncertain. As Justice Jackson eloquently stated in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943):

"'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'

"The State . . . , no less than the Congress of the United States, must respect that basic truth." *Wallace* v. *Jaffree*, 472 U. S. 38, 52–55 (1985) (footnotes omitted).

Syllabus

COUNTY OF ALLEGHENY ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87–2050. Argued February 22, 1989—Decided July 3, 1989*

This litigation concerns the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh. The first, a crèche depicting the Christian Nativity scene, was placed on the Grand Staircase of the Allegheny County Courthouse, which is the "main," "most beautiful," and "most public" part of the courthouse. The crèche was donated by the Holy Name Society, a Roman Catholic group, and bore a sign to that effect. Its manger had at its crest an angel bearing a banner proclaiming "Gloria in Excelsis Deo," meaning "Glory to God in the Highest." The second of the holiday displays in question was an 18-foot Chanukah menorah or candelabrum, which was placed just outside the City-County Building next to the city's 45-foot decorated Christmas tree. At the foot of the tree was a sign bearing the mayor's name and containing text declaring the city's "salute to liberty." The menorah is owned by Chabad, a Jewish group, but is stored, erected, and removed each year by the city. Respondents, the Greater Pittsburgh Chapter of the American Civil Liberties Union and seven local residents, filed suit seeking permanently to enjoin the county from displaying the crèche and the city from displaying the menorah on the ground that the displays violated the Establishment Clause of the First Amendment, made applicable to state governments by the Fourteenth Amendment. The District Court denied relief, relying on *Lynch* v. *Donnelly*, 465 U. S. 668, which held that a city's inclusion of a crèche in its annual Christmas display in a private park did not violate the Establishment Clause. The Court of Appeals reversed, distinguishing *Lynch* v. *Donnelly*, and holding that the crèche and the menorah in the present case must be understood as an impermissible governmental endorsement of Christianity and Judaism under *Lemon* v. *Kurtzman*, 403 U. S. 602.

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*Together with No. 88–90, *Chabad* v. *American Civil Liberties Union et al.*, and No. 88–96, *City of Pittsburgh* v. *American Civil Liberties Union, Greater Pittsburgh Chapter, et al.*, also on certiorari to the same court.

Held: The judgment is affirmed in part and reversed in part, and the cases are remanded.

842 F. 2d 655, affirmed in part, reversed in part, and remanded.

JUSTICE BLACKMUN delivered the opinion of the Court with respect to Parts III–A, IV, and V, concluding that:

1. Under *Lemon* v. *Kurtzman*, 403 U. S., at 612, a "practice which touches upon religion, if it is to be permissible under the Establishment Clause," must not, *inter alia*, "advance [or] inhibit religion in its principal or primary effect." Although, in refining the definition of governmental action that unconstitutionally "advances" religion, the Court's subsequent decisions have variously spoken in terms of "endorsement," "favoritism," "preference," or "promotion," the essential principle remains the same: The Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch* v. *Donnelly*, 465 U. S., at 687 (O'CONNOR, J., concurring). Pp. 589–594.

2. When viewed in its overall context, the crèche display violates the Establishment Clause. The crèche angel's words endorse a patently Christian message: Glory to God for the birth of Jesus Christ. Moreover, in contrast to *Lynch*, nothing in the crèche's setting detracts from that message. Although the government may acknowledge Christmas as a cultural phenomenon, it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus. Pp. 598–602.

3. JUSTICE KENNEDY's reasons for permitting the crèche on the Grand Staircase and his condemnation of the Court's reasons for deciding otherwise are unpersuasive. Pp. 602–613.

(a) History cannot legitimate practices like the crèche display that demonstrate the government's allegiance to a particular sect or creed. Pp. 602–605.

(b) The question whether a particular practice would constitute governmental proselytization is much the same as the endorsement inquiry, except to the extent the proselytization test requires an "obvious" allegiance between the government and the favored sect. This Court's decisions, however, impose no such burden on demonstrating that the government has favored a particular sect or creed, but, to the contrary, have required strict scrutiny of practices suggesting a denominational preference. *E. g.*, *Larson* v. *Valente*, 456 U. S. 228, 246. Pp. 605–609.

(c) The Constitution mandates that the government remain secular, rather than affiliating itself with religious beliefs or institutions, precisely in order to avoid discriminating against citizens on the basis of their religious faiths. Thus, the claim that prohibiting government from celebrating Christmas as a religious holiday discriminates against Chris-

tians in favor of nonadherents must fail, since it contradicts the fundamental premise of the Establishment Clause itself. In contrast, confining the government's own Christmas celebration to the holiday's secular aspects does *not* favor the religious beliefs of non-Christians over those of Christians, but simply permits the government to acknowledge the holiday without expressing an impermissible allegiance to Christian beliefs. Pp. 610–613.

JUSTICE BLACKMUN, joined by JUSTICE STEVENS, concluded in Part III–B that the concurring and dissenting opinions in *Lynch* v. *Donnelly* set forth the proper analytical framework for determining whether the government's display of objects having religious significance improperly advances religion. 465 U. S., at 687–694 (O'CONNOR, J., concurring); *id.*, at 694–726 (BRENNAN, J., dissenting). Pp. 594–597.

JUSTICE BLACKMUN concluded in Part VI that the menorah display does not have the prohibited effect of endorsing religion, given its "particular physical setting." Its combined display with a Christmas tree and a sign saluting liberty does not impermissibly endorse both the Christian and Jewish faiths, but simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society. The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas season emphasizes this point. The tree, moreover, by virtue of its size and central position in the display, is clearly the predominant element, and the placement of the menorah beside it is readily understood as simply a recognition that Christmas is not the only traditional way of celebrating the season. The absence of a more secular alternative to the menorah negates the inference of endorsement. Similarly, the presence of the mayor's sign confirms that in the particular context the government's association with a religious symbol does not represent sponsorship of religious beliefs but simply a recognition of cultural diversity. Given all these considerations, it is not sufficiently likely that a reasonable observer would view the combined display as an endorsement or disapproval of his individual religious choices. Pp. 613–621.

JUSTICE O'CONNOR also concluded that the city's display of a menorah, together with a Christmas tree and a sign saluting liberty, does not violate the Establishment Clause. The Christmas tree, whatever its origins, is widely viewed today as a secular symbol of the Christmas holiday. Although there may be certain secular aspects to Chanukah, it is primarily a religious holiday and the menorah its central religious symbol and ritual object. By including the menorah with the tree, however, and with the sign saluting liberty, the city conveyed a message of pluralism and freedom of belief during the holiday season, which, in this particular physical setting, could not be interpreted by a reasonable

observer as an endorsement of Judaism or Christianity or disapproval of alternative beliefs. Pp. 632–637.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA, concluded that both the menorah display and the crèche display are permissible under the Establishment Clause. Pp. 655–667.

(a) The test set forth in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612—which prohibits the "principal or primary effect" of a challenged governmental practice from either advancing or inhibiting religion—when applied with the proper sensitivity to our traditions and case law, supports the conclusion that both the crèche and the menorah are permissible displays in the context of the holiday season. The requirement of neutrality inherent in the *Lemon* formulation does not require a relentless extirpation of all contact between government and religion. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage, and the Establishment Clause permits government some latitude in recognizing the central role of religion in society. Any approach less sensitive to our heritage would border on latent hostility to religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious. Thus, this Court's decisions disclose two principles limiting the government's ability to recognize and accommodate religion: It may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to a religion in such a degree that it in fact establishes a state religion or tends to do so. In other words, the government may not place its weight behind an obvious effort to proselytize on behalf of a particular religion. On the other hand, where the government's act of recognition or accommodation is passive and symbolic, any intangible benefit to religion is unlikely to present a realistic risk of establishment. To determine whether there exists an establishment, or a tendency toward one, reference must be made to the other types of church-state contacts that have existed unchallenged throughout our history or that have been found permissible in our case law. For example, *Lynch* v. *Donnelly*, 465 U. S. 668, upheld a city's holiday display of a crèche, and *Marsh* v. *Chambers*, 463 U. S. 783, held that a State's practice of employing a legislative chaplain was permissible. Pp. 655–663.

(b) In permitting the displays of the menorah and the crèche, the city and county sought merely to "celebrate the season," and to acknowledge the historical background and the religious as well as secular nature of the Chanukah and Christmas holidays. This interest falls well within the tradition of governmental accommodation and acknowledgment of re-

ligion that has marked our history from the beginning. If government is to participate in its citizens' celebration of a holiday that contains both a secular and a religious component, enforced recognition of only the secular aspect would signify the callous indifference toward religious faith that our cases and traditions do not require; for by commemorating the holiday only as it is celebrated by nonadherents, the government would be refusing to acknowledge the plain fact, and the historical reality, that many of its citizens celebrate the religious aspects of the holiday as well. There is no suggestion here that the government's power to coerce has been used to further Christianity or Judaism or that the city or the county contributed money to further any one faith or intended to use the crèche or the menorah to proselytize. Thus, the crèche and menorah are purely passive symbols of religious holidays and their use is permissible under *Lynch*, *supra*. If *Marsh*, *supra*, allows Congress and the state legislatures to begin each day with a state-sponsored prayer offered by a government-employed chaplain, a menorah or crèche, displayed in the limited context of the holiday season, cannot be invalid. The facts that, unlike the crèche in *Lynch*, the menorah and crèche at issue were both located on government property and were not surrounded by secular holiday paraphernalia are irrelevant, since the displays present no realistic danger of moving the government down the forbidden road toward an establishment of religion. Pp. 663–667.

BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III–A, IV, and V, in which BRENNAN, MARSHALL, STEVENS, and O'CONNOR, JJ., joined, an opinion with respect to Parts I and II, in which STEVENS and O'CONNOR, JJ., joined, an opinion with respect to Part III–B, in which STEVENS, J., joined, an opinion with respect to Part VII, in which O'CONNOR, J., joined, and an opinion with respect to Part VI. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in Part II of which BRENNAN and STEVENS, JJ., joined, *post*, p. 623. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 637. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 646. KENNEDY, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., and WHITE and SCALIA, JJ., joined, *post*, p. 655.

Peter Buscemi argued the cause for petitioners in Nos. 87–2050 and 88–96. With him on the briefs were *George M. Janocsko*, *Robert L. McTiernan*, *D. R. Pellegrini*, and *George*

R. Specter. *Nathan Lewin* argued the cause for petitioner in No. 88–90. With him on the briefs was *Charles H. Saul*.

Roslyn M. Litman argued the cause for respondents. With her on the brief for respondents American Civil Liberties Union et al. were *Jon Pushinsky*, *James B. Lieber*, *John A. Powell*, and *Steven R. Shapiro*. *Ruti Teitel*, *Jeffrey P. Sinensky*, *Steven M. Freeman*, *Richard E. Shevitz*, and *Jill L. Kahn* filed a brief for respondent Tunador.†

JUSTICE BLACKMUN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III–A, IV, and V, an opinion with respect to Parts I and II, in which JUSTICE STEVENS and JUSTICE O'CONNOR join, an opinion with respect to Part III–B, in which JUSTICE STEVENS joins, an opinion with respect to Part VII, in which JUSTICE O'CONNOR joins, and an opinion with respect to Part VI.

This litigation concerns the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh. The first is a crèche placed on the Grand Staircase of the Allegheny County Courthouse. The second is a Chanukah menorah placed just outside the City-County Building, next to a Christmas tree and a sign saluting liberty. The Court of Appeals for the Third Circuit ruled that each display violates the Establishment Clause of the First Amendment because each has the impermissible effect of endorsing re-

†Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried*, *Deputy Solicitor General Ayer*, and *Michael K. Kellogg*; for the city of Warren, Michigan, by *Robert E. Williams*; for Concerned Women for America by *Jordan W. Lorence*, *Cimron Campbell*, and *Wendell R. Bird*; for the National Jewish Commission on Law and Public Affairs by *Dennis Rapps* and *A. David Stern*; and for the National Legal Foundation by *Douglas W. Davis*, *Robert K. Skolrood*, and *William C. Wood, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the American Jewish Committee et al. by *Samuel Rabinove*, *Richard T. Foltin*, *James G. Greilsheimer*, *Alan M. Klinger*, *David A. Stein*, *Lauren G. Klein*, and *Lee Boothby*; and for the American Jewish Congress et al. by *Arlene Fickler*, *Marc D. Stern*, *Lois C. Waldman*, and *Amy Adelson*.

ligion. 842 F. 2d 655 (1988). We agree that the crèche display has that unconstitutional effect but reverse the Court of Appeals' judgment regarding the menorah display.

I

A

The county courthouse is owned by Allegheny County and is its seat of government. It houses the offices of the county commissioners, controller, treasurer, sheriff, and clerk of court. Civil and criminal trials are held there. App. 69. The "main," "most beautiful," and "most public" part of the courthouse is its Grand Staircase, set into one arch and surrounded by others, with arched windows serving as a backdrop. *Id.*, at 157–158; see Joint Exhibit Volume (JEV) 31.

Since 1981, the county has permitted the Holy Name Society, a Roman Catholic group, to display a crèche in the county courthouse during the Christmas holiday season. App. 164. Christmas, we note perhaps needlessly, is the holiday when Christians celebrate the birth of Jesus of Nazareth, whom they believe to be the Messiah.[1] Western churches have celebrated Christmas Day on December 25 since the fourth century.[2] As observed in this Nation, Christmas has a secular, as well as a religious, dimension.[3]

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[1] See 8 Encyclopedia of Religion, "Jesus," 15, 18 (1987).

[2] See 3 Encyclopedia of Religion, "Christmas," 460 (1987). Some eastern churches, however, have not adopted December 25 as the Feast of the Nativity, retaining January 6 as the date for celebrating both the birth and the baptism of Jesus. R. Myers, Celebrations: The Complete Book of American Holidays 15, 17 (1972) (Myers).

[3] "[T]he Christmas holiday in our national culture contains both secular and sectarian elements." *Lynch* v. *Donnelly*, 465 U. S. 668, 709, and n. 15 (1984) (BRENNAN, J., dissenting). It has been suggested that the cultural aspect of Christmas in this country now exceeds the theological significance of the holiday. See J. Barnett, The American Christmas, a Study in National Culture 23 (1954) (Barnett) ("[B]y the latter part of the last century, the folk-secular aspects of Christmas were taking precedence over its religious ones").

The crèche in the county courthouse, like other crèches, is a visual representation of the scene in the manger in Bethlehem shortly after the birth of Jesus, as described in the Gospels of Luke and Matthew.[4] The crèche includes figures of the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men, all placed in or before a wooden representation of a manger, which has at its crest an angel bearing a banner that proclaims "Gloria in Excelsis Deo!"[5]

During the 1986–1987 holiday season, the crèche was on display on the Grand Staircase from November 26 to January 9. App. 15, 59. It had a wooden fence on three sides and bore a plaque stating: "This Display Donated by the Holy Name Society." Sometime during the week of December 2, the county placed red and white poinsettia plants around the fence. *Id.*, at 96. The county also placed a small evergreen tree, decorated with a red bow, behind each of the two endposts of the fence. *Id.*, at 204; JEV 7.[6] These trees stood alongside the manger backdrop and were slightly shorter than it was. The angel thus was at the apex of the crèche display. Altogether, the crèche, the fence, the poinsettias, and the trees occupied a substantial amount of space on the Grand Staircase. No figures of Santa Claus or other decora-

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[4] Luke 2:1–21; Matthew 2:1–11.

[5] This phrase comes from Luke, who tells of an angel appearing to the shepherds to announce the birth of the Messiah. After the angel told the shepherds that they would find the baby lying in a manger, "suddenly there was with the angel a multitude of the heavenly host praising God, and saying, Glory to God in the highest, and on earth peace, good will towards men." Luke 2:13–14 (King James Version). It is unlikely that an observer standing at the bottom of the Grand Staircase would be able to read the text of the angel's banner from that distance, but might be able to do so from a closer vantage point.

[6] On each side of the staircase was a sign indicating the direction of county offices. JEV 7–8. A small evergreen tree, decorated much like the trees behind the endposts, was placed next to each directional sign. *Ibid.*

tions appeared on the Grand Staircase. App. 188.[7] Cf. *Lynch* v. *Donnelly*, 465 U. S. 668, 671 (1984). Appendix A at the end of this opinion is a photograph of the display.

The county uses the crèche as the setting for its annual Christmas-carol program. See JEV 36. During the 1986 season, the county invited high school choirs and other musical groups to perform during weekday lunch hours from December 3 through December 23. The county dedicated this program to world peace and to the families of prisoners-of-war and of persons missing in action in Southeast Asia. App. 160; JEV 30.

Near the Grand Staircase is an area of the county courthouse known as the "gallery forum" used for art and other cultural exhibits. App. 163. The crèche, with its fence-and-floral frame, however, was distinct and not connected with any exhibit in the gallery forum. See Tr. of Oral Arg. 7 (the forum was "not any kind of an integral part of the Christmas display"); see also JEV 32–34. In addition, various departments and offices within the county courthouse had their own Christmas decorations, but these also are not visible from the Grand Staircase. App. 167.

B

The City-County Building is separate and a block removed from the county courthouse and, as the name implies, is jointly owned by the city of Pittsburgh and Allegheny County. The city's portion of the building houses the city's principal offices, including the mayor's. *Id.*, at 17. The city is responsible for the building's Grant Street entrance which has three rounded arches supported by columns. *Id.*, at 194, 207.

For a number of years, the city has had a large Christmas tree under the middle arch outside the Grant Street entrance. Following this practice, city employees on Novem-

[7] In the arched windows behind the staircase were two large wreaths, each with a large red ribbon. *Ibid.*

ber 17, 1986, erected a 45-foot tree under the middle arch and decorated it with lights and ornaments. *Id.*, at 218–219. A few days later, the city placed at the foot of the tree a sign bearing the mayor's name and entitled "Salute to Liberty." Beneath the title, the sign stated:

> "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." JEV 41.

At least since 1982, the city has expanded its Grant Street holiday display to include a symbolic representation of Chanukah, an 8-day Jewish holiday that begins on the 25th day of the Jewish lunar month of Kislev. App. 138.[8] The 25th of Kislev usually occurs in December,[9] and thus Chanukah is the annual Jewish holiday that falls closest to Christmas Day each year. In 1986, Chanukah began at sundown on December 26. *Id.*, at 138–139.

According to Jewish tradition, on the 25th of Kislev in 164 B.C.E. (before the common era (165 B.C.)), the Maccabees rededicated the Temple of Jerusalem after recapturing it from the Greeks, or, more accurately, from the Greek-influenced Seleucid Empire, in the course of a political rebellion. *Id.*,

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[8] See generally A. Bloch, The Biblical and Historical Background of the Jewish Holy Days 49–78 (1978) (Bloch, Holy Days); A. Bloch, The Biblical and Historical Background of Jewish Customs and Ceremonies 267–278 (1980) (Bloch, Ceremonies); 6 Encyclopedia of Religion, "Hanukkah," 193–194; 7 Encyclopaedia Judaica, "Hanukkah," 1280–1288 (1972); O. Rankin, The Origins of the Festival of Hanukkah (1930) (Rankin); A. Chill, The Minhagim 241–254 (1979) (Chill); L. Trepp, The Complete Book of Jewish Observance 137–151 (1980) (Trepp); M. Strassfeld, The Jewish Holidays 161–177 (1985) (Strassfeld).

[9] See Columbia Encyclopedia 1190 (4th ed. 1975); J. Williams, What Americans Believe and How they Worship 348 (3d ed. 1969); Myers 302; see also Strassfeld 202; see generally A. Spier, The Comprehensive Hebrew Calendar (1981).

at 138.[10] Chanukah is the holiday which celebrates that event.[11] The early history of the celebration of Chanukah is unclear; it appears that the holiday's central ritual—the lighting of lamps—was well established long before a single explanation of that ritual took hold.[12]

The Talmud[13] explains the lamplighting ritual as a commemoration of an event that occurred during the rededication of the Temple. The Temple housed a seven-branch menorah,[14] which was to be kept burning continuously. *Id.*, at 139, 144. When the Maccabees rededicated the Temple, they had only enough oil to last for one day. But, according to the Talmud, the oil miraculously lasted for eight days (the length of time it took to obtain additional oil). *Id.*, at 139.[15] To celebrate and publicly proclaim this miracle, the Talmud prescribes that it is a mitzvah (*i. e.*, a religious deed or commandment), *id.*, at 140,[16] for Jews to place a lamp with eight lights just outside the entrance to their homes or in a front window during the eight days of Chanukah. *Id.*, at

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[10] See P. Johnson, A History of the Jews 104 (1987) (Johnson); R. Seltzer, Jewish People, Jewish Thought: The Jewish Experience in History 158 (1980) (Seltzer).

[11] The word Chanukah, sometimes spelled Chanukkah or Hanukkah, is drawn from the Hebrew for "dedication." 7 Encyclopaedia Judaica 1280.

[12] See Strassfeld 161–163; Rankin 133.

[13] The Talmud (specifically the Babylonian Talmud) is a collection of rabbinic commentary on Jewish law that was compiled before the sixth century, App. 140. See 14 Encyclopedia of Religion, "Talmud," 256–259; see also Seltzer 265.

[14] "Menorah" is Hebrew for "candelabrum." See 11 Encyclopaedia Judaica, "Menorah," at 1356.

[15] See The Babylonian Talmud, Seder Mo'ed, 1 Shabbath 21b (Soncino Press 1938); Strassfeld 163; Trepp 143.

[16] Cf. "Mitzvah," in 12 Encyclopaedia Judaica 162 (4th ed., 1972) ("In common usage, *mitzvah* has taken on the meaning of a good deed. Already in the Talmud, this word was used for a meritorious act as distinct from a positive commandment"). The plural of mitzvah is mitzvot.

147.[17] Where practicality or safety from persecution so requires, the lamp may be placed in a window or inside the home.[18] The Talmud also ordains certain blessings to be recited each night of Chanukah before lighting the lamp.[19] One such benediction has been translated into English as "We are blessing God who has sanctified us and commanded us with mitzvot and has told us to light the candles of Hanukkah." *Id.*, at 306.[20]

Although Jewish law does not contain any rule regarding the shape or substance of a Chanukah lamp (or "hanukkiyyah"), *id.*, at 146, 238,[21] it became customary to evoke the memory of the Temple menorah. *Id.*, at 139, 144. The Temple menorah was of a tree-and-branch design; it had a central candlestick with six branches. *Id.*, at 259.[22] In contrast, a Chanukah menorah of tree-and-branch design has eight branches—one for each day of the holiday—plus a ninth to hold the shamash (an extra candle used to light the other eight). *Id.*, at 144.[23] Also in contrast to the Temple menorah, the Chanukah menorah is not a sanctified object; it need not be treated with special care.[24]

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[17] See also Bloch, Ceremonies 269. According to some Jewish authorities the miracle of Chanukah is the success of the Maccabees over the Seleucids, rather than the fact that the oil lasted eight days. App. 141. Either way, the purpose of lighting the Chanukah candles, as a religious mitzvah, is to celebrate a miracle. *Ibid.*

[18] Trepp 146; 7 Encyclopaedia Judaica 1283; Talmud Shabbath 21b.

[19] Bloch, Ceremonies 274.

[20] Another translation is "Praised are you, Lord our God, Ruler of the universe, who has sanctified our lives through His commandments, commanding us to kindle the Hanukkah lights." Strassfeld 167.

[21] Trepp 145; see generally 7 Encyclopaedia Judaica, "Hanukkah Lamp," 1288–1316.

[22] The design of the menorah is set forth in Exodus 25:31–40; see also 11 Encyclopaedia Judaica 1356–1370.

[23] Bloch, Ceremonies 274–275.

[24] A Torah scroll—which contains the five Books of Moses—must be buried in a special manner when it is no longer usable. App. 237–238.

Lighting the menorah is the primary tradition associated with Chanukah, but the holiday is marked by other traditions as well. One custom among some Jews is to give children Chanukah gelt, or money.[25] Another is for the children to gamble their gelt using a dreidel, a top with four sides. Each of the four sides contains a Hebrew letter; together the four letters abbreviate a phrase that refers to the Chanukah miracle. *Id.*, at 241–242.[26]

Chanukah, like Christmas, is a cultural event as well as a religious holiday. *Id.*, at 143. Indeed, the Chanukah story always has had a political or national, as well as a religious, dimension: it tells of national heroism in addition to divine intervention.[27] Also, Chanukah, like Christmas, is a winter holiday; according to some historians, it was associated in ancient times with the winter solstice.[28] Just as some Americans celebrate Christmas without regard to its religious significance, some nonreligious American Jews celebrate Chanukah as an expression of ethnic identity, and "as a cultural or national event, rather than as a specifically religious event." *Ibid.*[29]

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[25] Strassfeld 167; Bloch, Ceremonies 277.

[26] *Id.*, at 277–278; Trepp 147. It is also a custom to serve potato pancakes or other fried foods on Chanukah because the oil in which they are fried is, by tradition, a reminder of the miracle of Chanukah. App. 242–243; Strassfeld 168.

[27] *Id.*, at 164.

[28] Trepp 144, 150; 6 Encyclopedia of Religion 193; see also Strassfeld 176. Of course, the celebration of Christmas and Chanukah in the Southern Hemisphere occurs during summer. Nonetheless, both Christmas and Chanukah first developed in the Northern Hemisphere and have long-standing cultural associations with the beginning of winter. In fact, ancient rabbis chose Chanukah as the means to mark the beginning of winter. See Bloch, Holy Days 77.

[29] See also App. 229, 237. The Court of Appeals in this litigation plainly erred when it asserted that Chanukah "is not . . . a holiday with secular aspects." 842 F. 2d 655, 662 (CA3 1988). This assertion contradicts uncontroverted record evidence presented by respondents' own expert witness:

The cultural significance of Chanukah varies with the setting in which the holiday is celebrated. In contemporary Israel, the nationalist and military aspects of the Chanukah story receive special emphasis.[30] In this country, the tradition of giving Chanukah gelt has taken on greater importance because of the temporal proximity of Chanukah to Christmas.[31] Indeed, some have suggested that the proximity of Christmas accounts for the social prominence of Chanukah in this country.[32] Whatever the reason, Chanukah is observed by American Jews to an extent greater than its religious im-

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"There are also those Jews within the Jewish community who are nontheistic. . . . [T]hey base their celebration [of Chanukah] on something other than religion." App. 143.

In response to further questioning, the expert added that the celebration of Chanukah as a cultural event "certainly exists." *Ibid.* Thus, on this record, Chanukah unquestionably has "secular aspects," although it is also a religious holiday. See Chill 241 (Chanukah is celebrated by secular as well as religious Jews).

[30] Strassfeld 164–165; see also 7 Encyclopaedia Judaica 1288.

[31] "In America, Hanukkah has been influenced by the celebration of Christmas. While a tradition of giving Hanukkah gelt—money—is an old one, the proximity to Christmas has made gift giving an intrinsic part of the holiday." Strassfeld 164.

[32] "In general, the attempt to create a Jewish equivalent to Christmas has given Hanukkah more significance in the festival cycle than it has had in the past." *Ibid.* "Hanukkah has prospered because it comes about the same time as Christmas and can be used as the Jewish equivalent." D. Elazar, Community and Polity: The Organizational Dynamics of American Jewry 119 (1976). "Hanukkah was elaborated by American Jews to protect the child and to defend Judaism against the glamour and seductive power of Christmas." C. Liebman, The Ambivalent American Jew 66 (1973). See also M. Sklare & J. Greenblum, Jewish Identity on the Suburban Frontier 58 (1967):

"The aspects of Hanukkah observance currently emphasized—the exchange of gifts and the lighting and display of the *menorah* in the windows of homes—offer ready parallels to the general mode of Christmas observance as well as provide a 'Jewish' alternative to the holiday. Instead of alienating the Jew from the general culture, Hanukkah helps situate him as a participant in that culture. Hanukkah, in short, becomes for some the Jewish Christmas."

portance would indicate: in the hierarchy of Jewish holidays, Chanukah ranks fairly low in religious significance.[33] This socially heightened status of Chanukah reflects its cultural or secular dimension.[34]

On December 22 of the 1986 holiday season, the city placed at the Grant Street entrance to the City-County Building an 18-foot Chanukah menorah of an abstract tree-and-branch design. The menorah was placed next to the city's 45-foot Christmas tree, against one of the columns that supports the arch into which the tree was set. The menorah is owned by Chabad, a Jewish group,[35] but is stored, erected, and removed each year by the city. *Id.*, at 290; see also Brief for Petitioner in No. 88–96, p. 4. The tree, the sign, and the menorah were all removed on January 13. App. 58, 220–221. Appendix B, p. 622, is a photograph of the tree, the sign, and the menorah. App. 212; JEV 40.

II

This litigation began on December 10, 1986, when respondents, the Greater Pittsburgh Chapter of the American Civil Liberties Union and seven local residents, filed suit against the county and the city, seeking permanently to enjoin the county from displaying the crèche in the county courthouse and the city from displaying the menorah in front of the City-

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[33] See Chill 241 (from the perspective of Jewish religious law, Chanukah is "only a minor festival").

[34] Additionally, menorahs—like Chanukah itself—have a secular as well as a religious dimension. The record in this litigation contains a passing reference to the fact that menorahs "are used extensively by secular Jewish organizations to represent the Jewish people." App. 310.

[35] Chabad, also known as Lubavitch, is an organization of Hasidic Jews who follow the teachings of a particular Jewish leader, the Lubavitch Rebbe. *Id.*, at 228, 253–254. The Lubavitch movement is a branch of Hasidism, which itself is a branch of orthodox Judaism. *Id.*, at 249–250. Pittsburgh has a total population of 45,000 Jews; of these, 100 to 150 families attend synagogue at Pittsburgh's Lubavitch Center. *Id.*, at 247–251.

County Building.[36] Respondents claim that the displays of the crèche and the menorah each violate the Establishment Clause of the First Amendment, made applicable to state governments by the Fourteenth Amendment. See *Wallace* v. *Jaffree*, 472 U. S. 38, 48–55 (1985).[37] Chabad was permitted to intervene to defend the display of its menorah.[38]

On May 8, 1987, the District Court denied respondents' request for a permanent injunction. Relying on *Lynch* v. *Donnelly*, 465 U. S. 668 (1984), the court stated that "the crèche was but part of the holiday decoration of the stairwell and a foreground for the highschool choirs which entertained each day at noon." App. to Pet. for Cert. in No. 87–2050, p. 4a. Regarding the menorah, the court concluded that "it was but an insignificant part of another holiday display." *Ibid.* The court also found that "the displays had a secular purpose" and "did not create an excessive entanglement of government with religion." *Id.*, at 5a.

Respondents appealed, and a divided panel of the Court of Appeals reversed. 842 F. 2d 655 (CA3 1988). Distinguishing *Lynch* v. *Donnelly*, the panel majority determined that the crèche and the menorah must be understood as endorsing Christianity and Judaism. The court observed: "Each display was located at or in a public building devoted

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[36] Respondents also sought a preliminary injunction against the display of the crèche and menorah for the 1986–1987 holiday season. Characterizing the crèche and menorah as "de minimis in the context of the First Amendment," the District Court on December 15 denied respondents' motion for preliminary injunctive relief. *Id.*, at 10.

[37] Respondents, however, do not claim that the city's Christmas tree violates the Establishment Clause and do not seek to enjoin its display. Respondents also do not claim that the county's Christmas-carol program is unconstitutional. See Tr. of Oral Arg. 32.

[38] In addition to agreeing with the city that the menorah's display does not violate the Establishment Clause, Chabad contends that it has a constitutional right to display the menorah in front of the City-County Building. In light of the Court's disposition of the Establishment Clause question as to the menorah, there is no need to address Chabad's contention.

to core functions of government." 842 F. 2d, at 662. The court also stated: "Further, while the menorah was placed near a Christmas tree, neither the crèche nor the menorah can reasonably be deemed to have been subsumed by a larger display of non-religious items." *Ibid.* Because the impermissible effect of endorsing religion was a sufficient basis for holding each display to be in violation of the Establishment Clause under *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), the Court of Appeals did not consider whether either one had an impermissible purpose or resulted in an unconstitutional entanglement between government and religion.

The dissenting judge stated that the crèche, "accompanied by poinsettia plants and evergreens, does not violate the Establishment Clause simply because plastic Santa Clauses or reindeer are absent." 842 F. 2d, at 670. As to the menorah, he asserted: "Including a reference to Chanukah did no more than broaden the commemoration of the holiday season and stress the notion of sharing its joy." *Id.*, at 670–671.

Rehearing en banc was denied by a 6-to-5 vote. See App. to Pet. for Cert. in No. 87–2050, p. 45a. The county, the city, and Chabad each filed a petition for certiorari. We granted all three petitions. 488 U. S. 816 (1988).

III

A

This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent. Sectarian differences among various Christian denominations were central to the origins of our Republic. Since then, adherents of religions too numerous to name have made the United States their home, as have those whose beliefs expressly exclude religion.

Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: "Congress shall make no law respecting an establishment of religion, or

prohibiting the free exercise thereof . . . ." Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." *Wallace* v. *Jaffree*, 472 U. S., at 52.[39] It is settled law that no government official in this Nation may violate these fundamental constitutional rights regarding matters of conscience. *Id.*, at 49.

In the course of adjudicating specific cases, this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization,[40] may not discriminate among persons on the basis of their religious beliefs and practices,[41]

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[39] See also M. Borden, Jews, Turks, and Infidels (1984) (charting the history of discrimination against non-Christian citizens of the United States in the 18th and 19th centuries); Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 919–920 (1986) (Laycock) (the intolerance of late 18th-century Americans towards Catholics, Jews, Moslems, and atheists cannot be the basis of interpreting the Establishment Clause today).

[40] A State may neither allow public-school students to receive religious instruction on public-school premises, *Illinois ex rel. McCollum* v. *Board of Education of School Dist. No. 71, Champaign County*, 333 U. S. 203 (1948), nor allow religious-school students to receive state-sponsored education in their religious schools. *School District of Grand Rapids* v. *Ball*, 473 U. S. 373 (1985). Similarly unconstitutional is state-sponsored prayer in public schools. *Abington School District* v. *Schempp*, 374 U. S. 203 (1963); *Engel* v. *Vitale*, 370 U. S. 421 (1962). And the content of a public school's curriculum may not be based on a desire to promote religious beliefs. *Edwards* v. *Aguillard*, 482 U. S. 578 (1987); *Epperson* v. *Arkansas*, 393 U. S. 97 (1968). For the same reason, posting the Ten Commandments on the wall of a public-school classroom violates the Establishment Clause. *Stone* v. *Graham*, 449 U. S. 39 (1980).

[41] A statute that conditions the holding of public office on a belief in the existence of God is unconstitutional, *Torcaso* v. *Watkins*, 367 U. S. 488 (1961), as is one that grants a tax exemption for only religious literature, *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1 (1989), and one that grants an employee a right not to work on his Sabbath, *Estate of Thornton* v. *Caldor*,

may not delegate a governmental power to a religious institution,[42] and may not involve itself too deeply in such an institution's affairs.[43] Although "the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch* v. *Donnelly*, 465 U. S., at 694 (O'CONNOR, J., concurring), are not susceptible to a single verbal formulation, this Court has attempted to encapsulate the essential precepts of the Establishment Clause. Thus, in *Everson* v. *Board of Education of Ewing*, 330 U. S. 1 (1947), the Court gave this often-repeated summary:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*." *Id.*, at 15–16.

Inc., 472 U. S. 703, 709–710, and n. 9 (1985) (reasoning that other employees might also have strong reasons for taking a particular day off from work each week). See also *Larson* v. *Valente*, 456 U. S. 228 (1982) (invalidating a statute that imposed registration and reporting requirements upon only those religious organizations that solicit more than 50% of their funds from nonmembers).

[42] *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982).

[43] See *Aguilar* v. *Felton*, 473 U. S. 402, 409 (1985); *Wolman* v. *Walter*, 433 U. S. 229, 254 (1977); *Meek* v. *Pittenger*, 421 U. S. 349, 370 (1975); *Lemon* v. *Kurtzman*, 403 U. S. 602, 619–622 (1971).

In *Lemon* v. *Kurtzman*, *supra*, the Court sought to refine these principles by focusing on three "tests" for determining whether a government practice violates the Establishment Clause. Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion. 403 U. S., at 612–613. This trilogy of tests has been applied regularly in the Court's later Establishment Clause cases.[44]

Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion, a concern that has long had a place in our Establishment Clause jurisprudence. See *Engel* v. *Vitale*, 370 U. S. 421, 436 (1962). Thus, in *Wallace* v. *Jaffree*, 472 U. S., at 60, the Court held unconstitutional Alabama's moment-of-silence statute because it was "enacted . . . for the sole purpose of expressing the State's endorsement of prayer activities." The Court similarly invalidated Louisiana's "Creationism Act" because it "endorses religion" in its purpose. *Edwards* v. *Aguillard*, 482 U. S. 578, 593 (1987). And the educational

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[44] See, *e. g.*, *Bowen* v. *Kendrick*, 487 U. S. 589, 602 (1988); *Edwards* v. *Aguillard*, 482 U. S., at 583; *Witters* v. *Washington Dept. of Services for Blind*, 474 U. S. 481, 485 (1986); *Aguilar* v. *Felton*, 473 U. S., at 410; *School Dist. of Grand Rapids* v. *Ball*, 473 U. S., at 382–383; *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S., at 708; *Wallace* v. *Jaffree*, 472 U. S. 38, 55–56 (1985); *Larkin* v. *Grendel's Den, Inc.*, 459 U. S., at 123; *Stone* v. *Graham*, 449 U. S., at 40; *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U. S. 646, 653 (1980); *Meek* v. *Pittenger*, *supra*; *Sloan* v. *Lemon*, 413 U. S. 825 (1973); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U. S. 756, 772–773 (1973); *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973); *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U. S. 472, 481–482 (1973).

program in *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 389–392 (1985), was held to violate the Establishment Clause because of its "endorsement" effect. See also *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1, 17 (1989) (plurality opinion) (tax exemption limited to religious periodicals "effectively endorses religious belief").

Of course, the word "endorsement" is not self-defining. Rather, it derives its meaning from other words that this Court has found useful over the years in interpreting the Establishment Clause. Thus, it has been noted that the prohibition against governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*." *Wallace* v. *Jaffree*, 472 U. S., at 70 (O'CONNOR, J., concurring in judgment) (emphasis added). Accord, *Texas Monthly, Inc.* v. *Bullock*, 489 U. S., at 27, 28 (separate opinion concurring in judgment) (reaffirming that "government may not favor religious belief over disbelief" or adopt a "preference for the dissemination of religious ideas"); *Edwards* v. *Aguillard*, 482 U. S., at 593 ("preference" for particular religious beliefs constitutes an endorsement of religion); *Abington School District* v. *Schempp*, 374 U. S. 203, 305 (1963) (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion"). Moreover, the term "endorsement" is closely linked to the term "promotion," *Lynch* v. *Donnelly*, 465 U. S., at 691 (O'CONNOR, J., concurring), and this Court long since has held that government "may not . . . promote one religion or religious theory against another or even against the militant opposite," *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968). See also *Wallace* v. *Jaffree*, 472 U. S., at 59–60 (using the concepts of endorsement, promotion, and favoritism interchangeably).

Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The

Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch* v. *Donnelly*, 465 U. S., at 687 (O'CONNOR, J., concurring).

B

We have had occasion in the past to apply Establishment Clause principles to the government's display of objects with religious significance. In *Stone* v. *Graham*, 449 U. S. 39 (1980), we held that the display of a copy of the Ten Commandments on the walls of public classrooms violates the Establishment Clause. Closer to the facts of this litigation is *Lynch* v. *Donnelly*, *supra*, in which we considered whether the city of Pawtucket, R. I., had violated the Establishment Clause by including a crèche in its annual Christmas display, located in a private park within the downtown shopping district. By a 5-to-4 decision in that difficult case, the Court upheld inclusion of the crèche in the Pawtucket display, holding, *inter alia*, that the inclusion of the crèche did not have the impermissible effect of advancing or promoting religion.[45]

The rationale of the majority opinion in *Lynch* is none too clear: the opinion contains two strands, neither of which provides guidance for decision in subsequent cases. First, the opinion states that the inclusion of the crèche in the display was "no more an advancement or endorsement of religion" than other "endorsements" this Court has approved in the past, 465 U. S., at 683—but the opinion offers no discernible measure for distinguishing between permissible and impermissible endorsements. Second, the opinion observes that any benefit the government's display of the crèche gave to religion was no more than "indirect, remote, and incidental," *ibid.*—without saying how or why.

[45] There is no need here to review the applications in *Lynch* of the "purpose" and "entanglement" elements of the *Lemon* inquiry, since in the present action the Court of Appeals did not consider these issues.

Although JUSTICE O'CONNOR joined the majority opinion in *Lynch*, she wrote a concurrence that differs in significant respects from the majority opinion. The main difference is that the concurrence provides a sound analytical framework for evaluating governmental use of religious symbols.

First and foremost, the concurrence squarely rejects any notion that this Court will tolerate some government endorsement of religion. Rather, the concurrence recognizes any endorsement of religion as "invalid," *id.*, at 690, because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community," *id.*, at 688.

Second, the concurrence articulates a method for determining whether the government's use of an object with religious meaning has the effect of endorsing religion. The effect of the display depends upon the message that the government's practice communicates: the question is "what viewers may fairly understand to be the purpose of the display." *Id.*, at 692. That inquiry, of necessity, turns upon the context in which the contested object appears: "[A] typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Ibid.* The concurrence thus emphasizes that the constitutionality of the crèche in that case depended upon its "particular physical setting," *ibid.*, and further observes: "Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion," *id.*, at 694.[46]

[46] The difference in approach between the *Lynch* majority and the concurrence is especially evident in each opinion's treatment of *Marsh* v. *Chambers*, 463 U. S. 783 (1983). In that case, the Court sustained the practice of legislative prayer based on its unique history: Congress authorized the payment of legislative chaplains during the same week that it reached final agreement on the language of the Bill of Rights. *Id.*, at 788. The *Lynch* majority employed *Marsh* comparatively: to forbid the use of the crèche, "while the Congress and legislatures open sessions with pray-

The concurrence applied this mode of analysis to the Pawtucket crèche, seen in the context of that city's holiday celebration as a whole. In addition to the crèche, the city's display contained: a Santa Claus house with a live Santa distributing candy; reindeer pulling Santa's sleigh; a live 40-foot Christmas tree strung with lights; statues of carolers in old-fashioned dress; candy-striped poles; a "talking" wishing well; a large banner proclaiming "SEASONS GREETINGS"; a miniature "village" with several houses and a church; and various "cut-out" figures, including those of a clown, a dancing elephant, a robot, and a teddy bear. See 525 F. Supp. 1150, 1155 (RI 1981). The concurrence concluded that both because the crèche is "a traditional symbol" of Christmas, a holiday with strong secular elements, and because the crèche was "displayed along with purely secular symbols," the crèche's setting "changes what viewers may fairly understand to be the purpose of the display" and "negates any message of endorsement" of "the Christian beliefs represented by the crèche." 465 U. S., at 692.

The four *Lynch* dissenters agreed with the concurrence that the controlling question was "whether Pawtucket ha[d] run afoul of the Establishment Clause by endorsing religion through its display of the crèche." *Id.*, at 698, n. 3 (BRENNAN, J., dissenting). The dissenters also agreed with the

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ers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings." *Lynch*, 465 U. S., at 686.

The concurrence, in contrast, harmonized the result in *Marsh* with the endorsement principle in a rigorous way, explaining that legislative prayer (like the invocation that commences each session of this Court) is a form of acknowledgment of religion that "serve[s], in the only wa[y] reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." 465 U. S., at 693. The function and history of this form of ceremonial deism suggest that "those practices are not understood as conveying government approval of particular religious beliefs." *Ibid.*; see also *id.*, at 717 (BRENNAN, J., dissenting).

general proposition that the context in which the government uses a religious symbol is relevant for determining the answer to that question. *Id.*, at 705–706. They simply reached a different answer: the dissenters concluded that the other elements of the Pawtucket display did not negate the endorsement of Christian faith caused by the presence of the crèche. They viewed the inclusion of the crèche in the city's overall display as placing "the government's imprimatur of approval on the particular religious beliefs exemplified by the crèche." *Id.*, at 701. Thus, they stated: "The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support." *Ibid.*

Thus, despite divergence at the bottom line, the five Justices in concurrence and dissent in *Lynch* agreed upon the relevant constitutional principles: the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context. These general principles are sound, and have been adopted by the Court in subsequent cases. Since *Lynch*, the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Grand Rapids*, 473 U. S., at 390. Accordingly, our present task is to determine whether the display of the crèche and the menorah, in their respective "particular physical settings," has the effect of endorsing or disapproving religious beliefs.[47]

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[47] The county and the city argue that their use of religious symbols does not violate the Establishment Clause unless they are shown to be "coercive." Reply Brief for Petitioners County of Allegheny et al. 1–6; Tr. of Oral Arg. 9, 11. They recognize that this Court repeatedly has stated that

IV

We turn first to the county's crèche display. There is no doubt, of course, that the crèche itself is capable of communicating a religious message. See *Lynch*, 465 U. S., at 685 (majority opinion); *id.*, at 692 (O'CONNOR, J., concurring); *id.*, at 701 (BRENNAN, J., dissenting); *id.*, at 727 (BLACKMUN, J., dissenting). Indeed, the crèche in this lawsuit uses words, as well as the picture of the Nativity scene, to make its religious meaning unmistakably clear. "Glory to God in the Highest!" says the angel in the crèche—Glory to God because of the birth of Jesus. This praise to God in Christian terms is indisputably religious—indeed sectarian—just as it is when said in the Gospel or in a church service.

Under the Court's holding in *Lynch*, the effect of a crèche display turns on its setting. Here, unlike in *Lynch*, nothing in the context of the display detracts from the crèche's religious message. The *Lynch* display comprised a series of figures and objects, each group of which had its own focal point. Santa's house and his reindeer were objects of attention separate from the crèche, and had their specific visual story to tell. Similarly, whatever a "talking" wishing well may be, it obviously was a center of attention separate from the crèche. Here, in contrast, the crèche stands alone: it is the single element of the display on the Grand Staircase.[48]

"proof of coercion" is "not a necessary element of any claim under the Establishment Clause." *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U. S., at 786; see also *Abington School District* v. *Schempp*, 374 U. S., at 222–223; *Engel* v. *Vitale*, 370 U. S., at 430. But they suggest that the Court reconsider this principle. Reply Brief for Petitioners Allegheny County et al. 3; cf. *American Jewish Congress* v. *Chicago*, 827 F. 2d 120, 137 (CA7 1987) (dissenting opinion); McConnell, Coercion: The Lost Element of Establishment, 27 Wm. & Mary L. Rev. 933 (1986). The Court declines to do so, and proceeds to apply the controlling endorsement inquiry, which does not require an independent showing of coercion.

[48] The presence of Santas or other Christmas decorations elsewhere in the county courthouse, and of the nearby gallery forum, fail to negate the

The floral decoration surrounding the crèche cannot be viewed as somehow equivalent to the secular symbols in the overall *Lynch* display. The floral frame, like all good frames, serves only to draw one's attention to the message inside the frame. The floral decoration surrounding the crèche contributes to, rather than detracts from, the endorsement of religion conveyed by the crèche. It is as if the county had allowed the Holy Name Society to display a cross on the Grand Staircase at Easter, and the county had surrounded the cross with Easter lilies. The county could not say that surrounding the cross with traditional flowers of the season would negate the endorsement of Christianity conveyed by the cross on the Grand Staircase. Its contention that the traditional Christmas greens negate the endorsement effect of the crèche fares no better.

Nor does the fact that the crèche was the setting for the county's annual Christmas-carol program diminish its religious meaning. First, the carol program in 1986 lasted only from December 3 to December 23 and occupied at most one hour a day. JEV 28. The effect of the crèche on those who viewed it when the choirs were not singing—the vast majority of the time—cannot be negated by the presence of the choir program. Second, because some of the carols performed at the site of the crèche were religious in nature,[49] those carols were more likely to augment the religious quality of the scene than to secularize it.

Furthermore, the crèche sits on the Grand Staircase, the "main" and "most beautiful part" of the building that is the seat of county government. App. 157. No viewer could reasonably think that it occupies this location without the

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endorsement effect of the crèche. The record demonstrates clearly that the crèche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building. Tr. of Oral Arg. 7.

[49] See App. 169 (religious as well as nonreligious carols were sung at the program).

support and approval of the government.[50] Thus, by permitting the "display of the crèche in this particular physical setting," *Lynch*, 465 U. S., at 692 (O'CONNOR, J., concurring), the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message.

The fact that the crèche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion. On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own. But the Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations. See, *e. g.*, *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1 (1989) (government support of the distribution of religious messages by religious organizations violates the Establishment Clause). Indeed, the very concept of "endorsement" con-

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[50] The Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the crèche in that location for over six weeks would then not serve to associate the government with the crèche. Even if the Grand Staircase occasionally was used for displays other than the crèche (for example, a display of flags commemorating the 25th anniversary of Israel's independence, *id.*, at 176), it remains true that any display located there fairly may be understood to express views that receive the support and endorsement of the government. In any event, the county's own press releases made clear to the public that the county associated itself with the crèche. JEV 28 (flier identifying the choral program as county sponsored); *id.*, at 30; App. 174 (linking the crèche to the choral program). Moreover, the county created a visual link between itself and the crèche: it placed next to official county signs two small evergreens identical to those in the crèche display. In this respect, the crèche here does not raise the kind of "public forum" issue, cf. *Widmar* v. *Vincent*, 454 U. S. 263 (1981), presented by the crèche in *McCreary* v. *Stone*, 739 F. 2d 716 (CA2 1984), aff'd by an equally divided Court *sub nom. Board of Trustees of Scarsdale* v. *McCreary*, 471 U. S. 83 (1985) (private crèche in public park).

veys the sense of promoting someone else's message. Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message.

Finally, the county argues that it is sufficient to validate the display of the crèche on the Grand Staircase that the display celebrates Christmas, and Christmas is a national holiday. This argument obviously proves too much. It would allow the celebration of the Eucharist inside a courthouse on Christmas Eve. While the county may have doubts about the constitutional status of celebrating the Eucharist inside the courthouse under the government's auspices, see Tr. of Oral Arg. 8–9, this Court does not. The government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus.[51]

In sum, *Lynch* teaches that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under *Lynch*, and the rest of our cases, nothing more is required to

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[51] Nor can the display of the crèche be justified as an "accommodation" of religion. See *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987). Government efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion. *Id.*, at 348 (O'CONNOR, J., concurring in judgment). The display of a crèche in a courthouse does not remove any burden on the free exercise of Christianity. Christians remain free to display crèches in their homes and churches. To be sure, prohibiting the display of a crèche in the courthouse deprives Christians of the satisfaction of seeing the government adopt their religious message as their own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes.

demonstrate a violation of the Establishment Clause. The display of the crèche in this context, therefore, must be permanently enjoined.

V

JUSTICE KENNEDY and the three Justices who join him would find the display of the crèche consistent with the Establishment Clause. He argues that this conclusion necessarily follows from the Court's decision in *Marsh* v. *Chambers*, 463 U. S. 783 (1983), which sustained the constitutionality of legislative prayer. *Post*, at 665. He also asserts that the crèche, even in this setting, poses "no realistic risk" of "represent[ing] an effort to proselytize," *post*, at 664, having repudiated the Court's endorsement inquiry in favor of a "proselytization" approach. The Court's analysis of the crèche, he contends, "reflects an unjustified hostility toward religion." *Post*, at 655.

JUSTICE KENNEDY's reasons for permitting the crèche on the Grand Staircase and his condemnation of the Court's reasons for deciding otherwise are so far reaching in their implications that they require a response in some depth.

A

In *Marsh*, the Court relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights. See n. 46, *supra*. JUSTICE KENNEDY, however, argues that *Marsh* legitimates all "practices with no greater potential for an establishment of religion" than those "accepted traditions dating back to the Founding." *Post*, at 670, 669. Otherwise, the Justice asserts, such practices as our national motto ("In God We Trust") and our Pledge of Allegiance (with the phrase "under God," added in 1954, Pub. L. 396, 68 Stat. 249) are in danger of invalidity.

Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an en-

dorsement of religious belief. *Lynch*, 465 U. S., at 693 (O'CONNOR, J., concurring); *id.*, at 716–717 (BRENNAN, J., dissenting). We need not return to the subject of "ceremonial deism," see n. 46, *supra*, because there is an obvious distinction between crèche displays and references to God in the motto and the pledge. However history may affect the constitutionality of nonsectarian references to religion by the government,[52] history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.

Indeed, in *Marsh* itself, the Court recognized that not even the "unique history" of legislative prayer, 463 U. S., at 791, can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. *Id.*, at 794–795. The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had "removed all references to Christ." *Id.*, at 793, n. 14. Thus, *Marsh* plainly does not stand for the sweeping proposition JUSTICE KENNEDY apparently would ascribe to it, namely, that all accepted practices 200 years old and their equivalents are constitutional today. Nor can *Marsh*, given its facts and its reasoning, compel the conclusion that the display of the crèche involved in this lawsuit is constitutional. Although JUSTICE KENNEDY says that he "cannot comprehend" how the crèche display could be invalid after *Marsh*, *post*, at 665, surely he is able to distinguish between a specifically Christian symbol, like a crèche, and more general religious references, like the legislative prayers in *Marsh*.

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[52] It is worth noting that just because *Marsh* sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional. See *post*, at 672–673. Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct. But, as this practice is not before us, we express no judgment about its constitutionality.

JUSTICE KENNEDY's reading of *Marsh* would gut the core of the Establishment Clause, as this Court understands it. The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically. See M. Borden, Jews, Turks, and Infidels (1984).[53] Some of these examples date back to the Founding of the Republic,[54] but this heritage of official discrimination

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[53] Among the stories this scholar recounts is one that is especially apt in light of JUSTICE KENNEDY's citation of Thanksgiving Proclamations, *post*, at 671:

"When James H. Hammond, governor of South Carolina, announced a day of 'Thanksgiving, Humiliation, and Prayer' in 1844, he . . . exhorted 'our citizens of all denominations to assemble at their respective places of worship, to offer up their devotions to God their Creator, and his Son Jesus Christ, the Redeemer of the world.' The Jews of Charleston protested, charging Hammond with 'such obvious *discrimination and preference* in the tenor of your proclamation, as amounted to an utter exclusion of a portion of the people of South Carolina.' Hammond responded that 'I have always thought it a settled matter that I lived in a Christian land! And that I was the temporary chief magistrate of a Christian people. That in such a country and among such a people I should be, publicly, called to an account, reprimanded and required to make amends for acknowledging Jesus Christ as the Redeemer of the world, I would not have believed possible, if it had not come to pass' (*The Occident*, January 1845)." Borden 142, n. 2 (emphasis in Borden).

Thus, not all Thanksgiving Proclamations fit the nonsectarian or deist mold as did those examples quoted by JUSTICE KENNEDY. Moreover, the Jews of Charleston succinctly captured the precise evil caused by such sectarian proclamations as Governor Hammond's: they demonstrate an official *preference* for Christianity and a corresponding official *discrimination* against all non-Christians, amounting to an exclusion of a portion of the political community. It is against this very evil that the Establishment Clause, in part, is directed. Indeed, the Jews of Charleston could not better have formulated the essential concepts of the endorsement inquiry.

[54] In 1776, for instance, Maryland adopted a "Declaration of Rights" that allowed its legislature to impose a tax "for the support of the Christian religion" and a requirement that all state officials declare "a belief in the Christian religion." 1 A. Stokes, Church and State in the United States 865–866 (1950). Efforts made in 1797 to remove these discriminations against non-Christians were unsuccessful. *Id.*, at 867. See also *id.*, at 513 (quot-

against non-Christians has no place in the jurisprudence of the Establishment Clause. Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion, see, *e. g.*, *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1 (1989)), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U. S. 228, 244 (1982). There have been breaches of this command throughout this Nation's history, but they cannot diminish in any way the force of the command. Cf. Laycock, *supra*, n. 39, at 923.[55]

B

Although JUSTICE KENNEDY's misreading of *Marsh* is predicated on a failure to recognize the bedrock Establishment Clause principle that, regardless of history, government may not demonstrate a preference for a particular faith, even he is forced to acknowledge that some instances of such favoritism are constitutionally intolerable. *Post*, at 664–665, n. 3. He concedes also that the term "endorsement" long has been another way of defining a forbidden "preference" for

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ing the explicitly Christian proclamation of President John Adams, who urged all Americans to seek God's grace "through the Redeemer of the world" and "by His Holy Spirit").

[55] JUSTICE KENNEDY evidently believes that contemporary references to exclusively Christian creeds (like the Trinity or the divinity of Jesus) in official acts or proclamations is justified by the religious sentiments of those responsible for the adoption of the First Amendment. See 2 J. Story, Commentaries on the Constitution of the United States § 1874, p. 663 (1858) (at the time of the First Amendment's adoption, "the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state"). This Court, however, squarely has rejected the proposition that the Establishment Clause is to be interpreted in light of any favoritism for Christianity that may have existed among the Founders of the Republic. *Wallace* v. *Jaffree*, 472 U. S., at 52.

a particular sect, *post*, at 668–669, but he would repudiate the Court's endorsement inquiry as a "jurisprudence of minutiae," *post*, at 674, because it examines the particular contexts in which the government employs religious symbols.

This label, of course, could be tagged on many areas of constitutional adjudication. For example, in determining whether the Fourth Amendment requires a warrant and probable cause before the government may conduct a particular search or seizure, "we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements *in the particular context*," *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 619 (1989) (emphasis added), an inquiry that "'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself,'" *ibid.*, quoting *United States* v. *Montoya de Hernandez*, 473 U. S. 531, 537 (1985); see also *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 666 (1989) (repeating the principle that the applicability of the warrant requirement turns on "the particular context" of the search at issue). It is perhaps unfortunate, but nonetheless inevitable, that the broad language of many clauses within the Bill of Rights must be translated into adjudicatory principles that realize their full meaning only after their application to a series of concrete cases.

Indeed, not even under JUSTICE KENNEDY's preferred approach can the Establishment Clause be transformed into an exception to this rule. The Justice would substitute the term "proselytization" for "endorsement," *post*, at 659–660, 661, 664, but his "proselytization" test suffers from the same "defect," if one must call it that, of requiring close factual analysis. JUSTICE KENNEDY has no doubt, "for example, that the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious dis-

play would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Post*, at 661. He also suggests that a city would demonstrate an unconstitutional preference for Christianity if it displayed a Christian symbol during every major Christian holiday but did not display the religious symbols of other faiths during other religious holidays. *Post*, at 664–665, n. 3. But, for JUSTICE KENNEDY, would it be enough of a preference for Christianity if that city each year displayed a crèche for 40 days during the Christmas season and a cross for 40 days during Lent (and never the symbols of other religions)? If so, then what if there were no cross but the 40-day crèche display contained a sign exhorting the city's citizens "to offer up their devotions to God their Creator, and his Son Jesus Christ, the Redeemer of the world"? See n. 53, *supra*.

The point of these rhetorical questions is obvious. In order to define precisely what government could and could not do under JUSTICE KENNEDY's "proselytization" test, the Court would have to decide a series of cases with particular fact patterns that fall along the spectrum of government references to religion (from the permanent display of a cross atop city hall to a passing reference to divine Providence in an official address). If one wished to be "uncharitable" to JUSTICE KENNEDY, see *post*, at 675, one could say that his methodology requires counting the number of days during which the government displays Christian symbols and subtracting from this the number of days during which non-Christian symbols are displayed, divided by the number of different non-Christian religions represented in these displays, and then somehow factoring into this equation the prominence of the display's location and the degree to which each symbol possesses an inherently proselytizing quality. JUSTICE KENNEDY, of course, could defend his position by pointing to the inevitably fact-specific nature of the question whether a particular governmental practice signals the government's

unconstitutional preference for a specific religious faith. But because JUSTICE KENNEDY's formulation of this essential Establishment Clause inquiry is no less fact intensive than the "endorsement" formulation adopted by the Court, JUSTICE KENNEDY should be wary of accusing the Court's formulation as "using little more than intuition and a tape measure," *post*, at 675, lest he find his own formulation convicted on an identical charge.

Indeed, perhaps the only real distinction between JUSTICE KENNEDY's "proselytization" test and the Court's "endorsement" inquiry is a burden of "unmistakable" clarity that JUSTICE KENNEDY apparently would require of government favoritism for specific sects in order to hold the favoritism in violation of the Establishment Clause. *Post*, at 664–665, n. 3. The question whether a particular practice "would place the government's weight behind an obvious effort to proselytize for a particular religion," *post*, at 661, is much the same as whether the practice demonstrates the government's support, promotion, or "endorsement" of the particular creed of a particular sect—except to the extent that it requires an "obvious" allegiance between the government and the sect.[56]

Our cases, however, impose no such burden on demonstrating that the government has favored a particular sect or creed. On the contrary, we have expressly required "strict

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[56] In describing what would violate his "proselytization" test, JUSTICE KENNEDY uses the adjectives "permanent," "year-round," and "continual," *post*, at 661, 664–665, n. 3, as if to suggest that temporary acts of favoritism for a particular sect do not violate the Establishment Clause. Presumably, however, JUSTICE KENNEDY does not really intend these adjectives to define the limits of his principle, since it is obvious that the government's efforts to proselytize may be of short duration, as Governor Hammond's Thanksgiving Proclamation illustrates. See n. 53, *supra*. In any event, the Court repudiated any notion that preferences for particular religious beliefs are permissible unless permanent when, in *Bowen* v. *Kendrick*, 487 U. S., at 620, it ordered an inquiry into the "specific instances of impermissible behavior" that may have occurred in the administration of a statutory program.

scrutiny" of practices suggesting "a denominational preference," *Larson* v. *Valente*, 456 U. S., at 246, in keeping with "'the unwavering vigilance that the Constitution requires'" against any violation of the Establishment Clause. *Bowen* v. *Kendrick*, 487 U. S. 589, 623 (1988) (O'CONNOR, J., concurring), quoting *id.*, at 648 (dissenting opinion); see also *Lynch*, 465 U. S., at 694 (O'CONNOR, J., concurring) ("[T]he myriad, subtle ways in which Establishment Clause values can be eroded" necessitates "careful judicial scrutiny" of "[g]overnment practices that purport to celebrate or acknowledge events with religious significance"). Thus, when all is said and done, JUSTICE KENNEDY's effort to abandon the "endorsement" inquiry in favor of his "proselytization" test seems nothing more than an attempt to lower considerably the level of scrutiny in Establishment Clause cases. We choose, however, to adhere to the vigilance the Court has managed to maintain thus far, and to the endorsement inquiry that reflects our vigilance.[57]

[57] It is not clear, moreover, why JUSTICE KENNEDY thinks the display of the crèche in this lawsuit is permissible even under his lax "proselytization" test. Although early on in his opinion he finds "no realistic risk that the crèche . . . represent[s] an effort to proselytize," *post*, at 664, at the end he concludes: "[T]he eager proselytizer may seek to use [public crèche displays] for his own ends. The urge to use them to teach or to taunt is *always present*." *Post*, at 678 (emphasis added). Whatever the cause of this inconsistency, it should be obvious to all that the crèche on the Grand Staircase communicates the message that Jesus is the Messiah and to be worshipped as such, an inherently prosyletizing message if ever there was one. In fact, the angel in the crèche display represents, according to Christian tradition, one of the original "proselytizers" of the Christian faith: the angel who appeared to the shepherds to tell them of the birth of Christ. Thus, it would seem that JUSTICE KENNEDY should find this display unconstitutional according to a consistent application of his principle that government may not place its weight behind obvious efforts to proselytize Christian creeds specifically.

Contrary to JUSTICE KENNEDY's assertion, the Court's decision in *Lynch* does not foreclose this conclusion. *Lynch* certainly is *not* "dispositive of [a] claim," *post*, at 665, regarding the government's display of a crèche bearing an explicitly proselytizing sign (like "Let's all rejoice in

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Although JUSTICE KENNEDY repeatedly accuses the Court of harboring a "latent hostility" or "callous indifference" toward religion, *post*, at 657, 664, nothing could be further from the truth, and the accusations could be said to be as offensive as they are absurd. JUSTICE KENNEDY apparently has misperceived a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion. No misperception could be more antithetical to the values embodied in the Establishment Clause.

JUSTICE KENNEDY's accusations are shot from a weapon triggered by the following proposition: if government may celebrate the secular aspects of Christmas, then it must be allowed to celebrate the religious aspects as well because, otherwise, the government would be discriminating against citizens who celebrate Christmas as a religious, and not just a secular, holiday. *Post*, at 663–664. This proposition, however, is flawed at its foundation. The government does not discriminate against any citizen on the basis of the citizen's religious faith if the government is secular in its functions and operations. On the contrary, the Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths.

A secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed. JUSTICE KENNEDY thus has it exactly backwards when he says that enforcing the Constitution's requirement that govern-

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Jesus Christ, the Redeemer of the world," cf. n. 53, *supra*). As much as JUSTICE KENNEDY tries, see *post*, at 665–666, there is no hiding behind the fiction that *Lynch* decides the constitutionality of every possible government crèche display. Once stripped of this fiction, JUSTICE KENNEDY's opinion transparently lacks a principled basis, consistent with our precedents, for asserting that the crèche display here must be held constitutional.

ment remain secular is a prescription of orthodoxy. *Post*, at 678. It follows directly from the Constitution's proscription against government affiliation with religious beliefs or institutions that there is no orthodoxy on religious matters in the secular state. Although JUSTICE KENNEDY accuses the Court of "an Orwellian rewriting of history," *ibid.*, perhaps it is JUSTICE KENNEDY himself who has slipped into a form of Orwellian newspeak when he equates the constitutional command of secular government with a prescribed orthodoxy.

To be sure, in a pluralistic society there may be some would-be theocrats, who wish that their religion were an established creed, and some of them perhaps may be even audacious enough to claim that the lack of established religion discriminates against their preferences. But this claim gets no relief, for it contradicts the fundamental premise of the Establishment Clause itself. The antidiscrimination principle inherent in the Establishment Clause necessarily means that would-be discriminators on the basis of religion cannot prevail.

For this reason, the claim that prohibiting government from celebrating Christmas as a religious holiday discriminates against Christians in favor of nonadherents must fail. Celebrating Christmas as a religious, as opposed to a secular, holiday, necessarily entails professing, proclaiming, or believing that Jesus of Nazareth, born in a manger in Bethlehem, is the Christ, the Messiah. If the government celebrates Christmas as a religious holiday (for example, by issuing an official proclamation saying: "We rejoice in the glory of Christ's birth!"), it means that the government really is declaring Jesus to be the Messiah, a specifically Christian belief. In contrast, confining the government's own celebration of Christmas to the holiday's secular aspects does *not* favor the religious beliefs of non-Christians over those of Christians. Rather, it simply permits the government to acknowledge the holiday without expressing an allegiance to

Christian beliefs, an allegiance that would truly favor Christians over non-Christians. To be sure, some Christians may wish to see the government proclaim its allegiance to Christianity in a religious celebration of Christmas, but the Constitution does not permit the gratification of that desire, which would contradict the "'the logic of secular liberty'" it is the purpose of the Establishment Clause to protect. See *Larson* v. *Valente*, 456 U. S., at 244, quoting B. Bailyn, The Ideological Origins of the American Revolution 265 (1967).

Of course, not all religious celebrations of Christmas located on government property violate the Establishment Clause. It obviously is not unconstitutional, for example, for a group of parishioners from a local church to go caroling through a city park on any Sunday in Advent or for a Christian club at a public university to sing carols during their Christmas meeting. Cf. *Widmar* v. *Vincent*, 454 U. S. 263 (1981).[58] The reason is that activities of this nature do not demonstrate the government's allegiance to, or endorsement of, the Christian faith.

Equally obvious, however, is the proposition that not all proclamations of Christian faith located on government property are permitted by the Establishment Clause just because they occur during the Christmas holiday season, as the example of a Mass in the courthouse surely illustrates. And once the judgment has been made that a particular proclamation of Christian belief, when disseminated from a particular location on government property, has the effect of demonstrating the government's endorsement of Christian faith, then it necessarily follows that the practice must be enjoined to protect the constitutional rights of those citizens who follow some creed other than Christianity. It is thus incontrovertible that the Court's decision today, premised on the determination that the crèche display on the Grand Staircase demon-

[58] Thus, JUSTICE KENNEDY is incorrect when he says, *post*, at 674, n. 10, that the Court fails to explain why today's decision does not require the elimination of all religious Christmas music from public property.

strates the county's endorsement of Christianity, does not represent a hostility or indifference to religion but, instead, the respect for religious diversity that the Constitution requires.[59]

VI

The display of the Chanukah menorah in front of the City-County Building may well present a closer constitutional question. The menorah, one must recognize, is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah's message is not exclusively religious. The menorah is the primary visual

[59] In his attempt to legitimate the display of the crèche on the Grand Staircase, JUSTICE KENNEDY repeatedly characterizes it as an "accommodation" of religion. See, *e. g.*, *post*, at 663, 664. But an accommodation of religion, in order to be permitted under the Establishment Clause, must lift "an identifiable burden *on the exercise of religion.*" *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S., at 348 (O'CONNOR, J., concurring in judgment) (emphasis in original); see also McConnell, Accommodation of Religion, 1985 S. Ct. Rev. 1, 3–4 (defining "accommodation" as government action as "specifically for the purpose of facilitating the free exercise of religion," usually by exempting religious practices from general regulations). Defined thus, the concept of accommodation plainly has no relevance to the display of the crèche in this lawsuit. See n. 51, *supra*.

One may agree with JUSTICE KENNEDY that the scope of accommodations permissible under the Establishment Clause is larger than the scope of accommodations mandated by the Free Exercise Clause. See *post*, at 663, n. 2. An example prompted by the Court's decision in *Goldman* v. *Weinberger*, 475 U. S. 503 (1986), comes readily to mind: although the Free Exercise Clause does not require the Air Force to exempt yarmulkes from a no-headdress rule, it is at least plausible that the Establishment Clause permits the Air Force to promulgate a regulation exempting yarmulkes (and similar religiously motivated headcoverings) from its no-headdress rule. But a category of "permissible accommodations of religion not required by the Free Exercise Clause" aids the crèche on the Grand Staircase not at all. Prohibiting the display of a crèche at this location, it bears repeating, does not impose a burden on the practice of Christianity (except to the extent that some Christian sect seeks to be an officially approved religion), and therefore permitting the display is not an "accommodation" of religion in the conventional sense.

symbol for a holiday that, like Christmas, has both religious and secular dimensions.[60]

Moreover, the menorah here stands next to a Christmas tree and a sign saluting liberty. While no challenge has been made here to the display of the tree and the sign, their presence is obviously relevant in determining the effect of the menorah's display. The necessary result of placing a menorah next to a Christmas tree is to create an "overall holiday setting" that represents both Christmas and Chanukah—two holidays, not one. See *Lynch*, 465 U. S., at 692 (O'CONNOR, J., concurring).

The mere fact that Pittsburgh displays symbols of both Christmas and Chanukah does not end the constitutional inquiry. If the city celebrates both Christmas and Chanukah as religious holidays, then it violates the Establishment Clause.

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[60] JUSTICE KENNEDY is clever but mistaken in asserting that the description of the menorah, *supra*, at 582–587, purports to turn the Court into a "national theology board." *Post*, at 678. Any inquiry concerning the government's use of a religious object to determine whether that use results in an unconstitutional religious preference requires a review of the factual record concerning the religious object—even if the inquiry is conducted pursuant to JUSTICE KENNEDY's "proselytization" test. Surely, JUSTICE KENNEDY cannot mean that this Court must keep itself in ignorance of the symbol's conventional use and decide the constitutional question knowing only what it knew before the case was filed. This prescription of ignorance obviously would bias this Court according to the religious and cultural backgrounds of its Members, a condition much more intolerable than any which results from the Court's efforts to become familiar with the relevant facts.

Moreover, the relevant facts concerning Chanukah and the menorah are largely to be found in the record, as indicated by the extensive citation to the Appendix, *supra*, at 582–585. In any event, Members of this Court have not hesitated in referring to secondary sources in aid of their Establishment Clause analysis, see, *e. g.*, *Lynch*, 465 U. S., at 709–712, 721–724 (BRENNAN, J., dissenting), because the question "whether a government activity communicates an endorsement of religion" is "in large part a legal question to be answered on the basis of judicial interpretation of social facts," *id.*, at 693–694 (O'CONNOR, J., concurring).

The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.[61]

Conversely, if the city celebrates both Christmas and Chanukah as secular holidays, then its conduct is beyond the reach of the Establishment Clause. Because government may celebrate Christmas as a secular holiday,[62] it follows that government may also acknowledge Chanukah as a secular holiday. Simply put, it would be a form of discrimination against Jews to allow Pittsburgh to celebrate Christmas as a cultural tradition while simultaneously disallowing the city's acknowledgment of Chanukah as a contemporaneous cultural tradition.[63]

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[61] The display of a menorah next to a crèche on government property might prove to be invalid. Cf. *Greater Houston Chapter of American Civil Liberties Union* v. *Eckels*, 589 F. Supp. 222 (SD Tex. 1984), appeal dism'd, 755 F. 2d 426 (CA5), cert. denied, 474 U. S. 980 (1985) (war memorial containing crosses and a Star of David unconstitutionally favored Christianity and Judaism, discriminating against the beliefs of patriotic soldiers who were neither Christian nor Jewish).

[62] It is worth recalling here that no Member of the Court in *Lynch* suggested that government may not celebrate the secular aspects of Christmas. On the contrary, the four dissenters there stated: "If public officials . . . participate in the *secular* celebration of Christmas—by, for example, decorating public places with such secular images as wreaths, garlands, or Santa Claus figures—they move closer to the limits of their constitutional power but nevertheless remain within the boundaries set by the Establishment Clause." 465 U. S., at 710–711 (BRENNAN, J., dissenting) (emphasis in original).

[63] Thus, to take the most obvious of examples, if it were permissible for the city to display in front of the City-County Building a banner exclaiming "Merry Christmas," then it would also be permissible for the city to display in the same location a banner proclaiming "Happy Chanukah."

JUSTICE BRENNAN, however, seems to suggest that even this practice is problematic because holidays associated with other religious traditions would be excluded. See *post*, at 644. But when the government engages in the secular celebration of Christmas, without any reference to holidays celebrated by non-Christians, other traditions are excluded—and yet

Accordingly, the relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society. Of the two interpretations of this particular display, the latter seems far more plausible and is also in line with *Lynch*.[64]

The Christmas tree, unlike the menorah, is not itself a religious symbol. Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas. See *American Civil Liberties Union of Illinois* v. *St. Charles*, 794 F. 2d 265, 271 (CA7), cert. denied, 479 U. S. 961 (1986); L. Tribe, American Constitutional Law 1295 (2d ed. 1988) (Tribe).[65] Numerous Americans place

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JUSTICE BRENNAN has approved the government's secular celebration of Christmas. See n. 62, *supra*.

[64] It is distinctly implausible to view the combined display of the tree, the sign, and the menorah as endorsing the Jewish faith alone. During the time of this litigation, Pittsburgh had a population of 387,000, of which approximately 45,000 were Jews. U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 34 (108th ed. 1988); App. 247. When a city like Pittsburgh places a symbol of Chanukah next to a symbol of Christmas, the result may be a simultaneous endorsement of Christianity and Judaism (depending upon the circumstances of the display). But the city's addition of a visual representation of Chanukah to its pre-existing Christmas display cannot reasonably be understood as an endorsement of Jewish—yet not Christian—belief. Thus, unless the combined Christmas-Chanukah display fairly can be seen as a double endorsement of Christian and Jewish faiths, it must be viewed as celebrating both holidays without endorsing either faith.

The conclusion that Pittsburgh's combined Christmas-Chanukah display cannot be interpreted as endorsing Judaism alone does not mean, however, that it is implausible, as a general matter, for a city like Pittsburgh to endorse a minority faith. The display of a menorah alone might well have that effect.

[65] See also Barnett 141–142 (describing the Christmas tree, along with gift giving and Santa Claus, as those aspects of Christmas which have be-

Christmas trees in their homes without subscribing to Christian religious beliefs, and when the city's tree stands alone in front of the City-County Building, it is not considered an endorsement of Christian faith. Indeed, a 40-foot Christmas tree was one of the objects that validated the crèche in *Lynch*. The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas holiday season serves to emphasize the secular component of the message communicated by other elements of an accompanying holiday display, including the Chanukah menorah.[66]

The tree, moreover, is clearly the predominant element in the city's display. The 45-foot tree occupies the central position beneath the middle archway in front of the Grant Street entrance to the City-County Building; the 18-foot menorah is positioned to one side. Given this configuration, it is much more sensible to interpret the meaning of the menorah in light of the tree, rather than vice versa. In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season. In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both the Christian

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come "so intimately identified with national life" that immigrants feel the need to adopt these customs in order to be a part of American culture). Of course, the tree is capable of taking on a religious significance if it is decorated with religious symbols. Cf. Gilbert, The Season of Good Will and Inter-religious Tension, 24 Reconstructionist 13 (1958) (considering the Christmas tree, without the Star of Bethlehem, as one of "the cultural aspects of the Christmas celebration").

[66] Although the Christmas tree represents the secular celebration of Christmas, its very association with Christmas (a holiday with religious dimensions) makes it conceivable that the tree might be seen as representing Christian religion when displayed next to an object associated with Jewish religion. For this reason, I agree with JUSTICE BRENNAN and JUSTICE STEVENS that one must ask whether the tree and the menorah together endorse the *religious* beliefs of Christians and Jews. For the reasons stated in the text, however, I conclude the city's overall display does not have this impermissible effect.

and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition.

Although the city has used a symbol with religious meaning as its representation of Chanukah, this is not a case in which the city has reasonable alternatives that are less religious in nature. It is difficult to imagine a predominantly secular symbol of Chanukah that the city could place next to its Christmas tree. An 18-foot dreidel would look out of place and might be interpreted by some as mocking the celebration of Chanukah. The absence of a more secular alternative symbol is itself part of the context in which the city's actions must be judged in determining the likely effect of its use of the menorah. Where the government's secular message can be conveyed by two symbols, only one of which carries religious meaning, an observer reasonably might infer from the fact that the government has chosen to use the religious symbol that the government means to promote religious faith. See *Abington School District* v. *Schempp*, 374 U. S., at 295 (BRENNAN, J., concurring) (Establishment Clause forbids use of religious means to serve secular ends when secular means suffice); see also Tribe 1285.[67] But where, as here, no such choice has been made, this inference of endorsement is not present.[68]

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[67] Contrary to the assertions of JUSTICE O'CONNOR and JUSTICE KENNEDY, I have not suggested here that the government's failure to use an available secular alternative *necessarily* results in an Establishment Clause violation. Rather, it suffices to say that the availability or unavailability of secular alternatives is an obvious *factor* to be considered in deciding whether the government's use of a religious symbol amounts to an endorsement of religious faith.

[68] In *Lynch*, in contrast, there was no need for Pawtucket to include a crèche in order to convey a secular message about Christmas. See 465 U. S., at 726–727 (BLACKMUN, J., dissenting). Thus, unless the addition of the crèche to the Pawtucket display was recognized as an endorsement of Christian faith, the crèche there was "relegated to the role of a neutral

The mayor's sign further diminishes the possibility that the tree and the menorah will be interpreted as a dual endorsement of Christianity and Judaism. The sign states that during the holiday season the city salutes liberty. Moreover, the sign draws upon the theme of light, common to both Chanukah and Christmas as winter festivals, and links that theme with this Nation's legacy of freedom, which allows an American to celebrate the holiday season in whatever way he wishes, religiously or otherwise. While no sign can disclaim an overwhelming message of endorsement, see *Stone* v. *Graham*, 449 U. S., at 41, an "explanatory plaque" may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs. See *Lynch*, 465 U. S., at 707 (BRENNAN, J., dissenting). Here, the mayor's sign serves to confirm what the context already reveals: that the display of the menorah is not an endorsement of religious faith but simply a recognition of cultural diversity.

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harbinger of the holiday season," *id.*, at 727, serving no function different from that performed by the secular symbols of Christmas. But the same cannot be said of the addition of the menorah to the Pittsburgh display. The inclusion of the menorah here broadens the Pittsburgh display to refer not only to Christmas but also to Chanukah—a different holiday belonging to a different tradition. It does not demean Jewish faith or the religious significance of the menorah to say that the menorah in *this* context represents the holiday of Chanukah as a whole (with religious and secular aspects), just as the Christmas tree in this context can be said to represent the holiday of Christmas as a whole (with *its* religious and secular aspects).

Thus, the menorah retains its religious significance even in this display, but it does not follow that the city has endorsed religious belief over nonbelief. In displaying the menorah next to the tree, the city has demonstrated no preference for the *religious* celebration of the holiday season. This conclusion, however, would be untenable had the city substituted a crèche for its Christmas tree or if the city had failed to substitute for the menorah an alternative, more secular, representation of Chanukah.

Given all these considerations, it is not "sufficiently likely" that residents of Pittsburgh will perceive the combined display of the tree, the sign, and the menorah as an "endorsement" or "disapproval . . . of their individual religious choices." *Grand Rapids*, 473 U. S., at 390. While an adjudication of the display's effect must take into account the perspective of one who is neither Christian nor Jewish, as well as of those who adhere to either of these religions, *ibid.*, the constitutionality of its effect must also be judged according to the standard of a "reasonable observer," see *Witters* v. *Washington Dept. of Services for Blind*, 474 U. S. 481, 493 (1986) (O'CONNOR, J., concurring in part and concurring in judgment); see also Tribe 1296 (challenged government practices should be judged "from the perspective of a 'reasonable non-adherent' "). When measured against this standard, the menorah need not be excluded from this particular display. The Christmas tree alone in the Pittsburgh location does not endorse Christian belief; and, on the facts before us, the addition of the menorah "cannot fairly be understood to" result in the simultaneous endorsement of Christian and Jewish faiths. *Lynch*, 465 U. S., at 693 (O'CONNOR, J., concurring). On the contrary, for purposes of the Establishment Clause, the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season.[69]

The conclusion here that, in this particular context, the menorah's display does not have an effect of endorsing reli-

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[69] This is not to say that the combined display of a Christmas tree and a menorah is constitutional wherever it may be located on government property. For example, when located in a public school, such a display might raise additional constitutional considerations. Cf. *Edwards* v. *Aguillard*, 482 U. S., at 583–584 (Establishment Clause must be applied with special sensitivity in the public-school context).

gious faith does not foreclose the possibility that the display of the menorah might violate either the "purpose" or "entanglement" prong of the *Lemon* analysis. These issues were not addressed by the Court of Appeals and may be considered by that court on remand.[70]

VII

Lynch v. *Donnelly* confirms, and in no way repudiates, the longstanding constitutional principle that government may not engage in a practice that has the effect of promoting or endorsing religious beliefs. The display of the crèche in the county courthouse has this unconstitutional effect. The display of the menorah in front of the City-County Building, however, does not have this effect, given its "particular physical setting."

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings.

It is so ordered.

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[70] In addition, nothing in this opinion forecloses the possibility that on other facts a menorah display could constitute an impermissible endorsement of religion. Indeed, there is some evidence in this record that in the past Chabad lit the menorah in front of the City-County Building in a religious ceremony that included the recitation of traditional religious blessings. See App. 281. Respondents, however, did not challenge this practice, there are no factual findings on it, and the Court of Appeals did not consider it in deciding that the display of a menorah in this location necessarily endorses Judaism. See 842 F. 2d, at 662.

There is also some suggestion in the record that Chabad advocates the public display of menorahs as part of its own proselytizing mission, but again there have been no relevant factual findings that would enable this Court to conclude that Pittsburgh has endorsed Chabad's particular proselytizing message. Of course, nothing in this opinion forecloses a challenge to a menorah display based on such factual findings.

APPENDIX A

APPENDIX B

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN and JUSTICE STEVENS join as to Part II, concurring in part and concurring in the judgment.

I

Judicial review of government action under the Establishment Clause is a delicate task. The Court has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion. Instead the courts have made case-specific examinations of the challenged government action and have attempted to do so with the aid of the standards described by JUSTICE BLACKMUN in Part III–A of the Court's opinion. *Ante*, at 590–594. Unfortunately, even the development of articulable standards and guidelines has not always resulted in agreement among the Members of this Court on the results in individual cases. And so it is again today.

The constitutionality of the two displays at issue in these cases turns on how we interpret and apply the holding in *Lynch* v. *Donnelly*, 465 U. S. 668 (1984), in which we rejected an Establishment Clause challenge to the city of Pawtucket's inclusion of a crèche in its annual Christmas holiday display. The seasonal display reviewed in *Lynch* was located in a privately owned park in the heart of the shopping district. *Id.*, at 671. In addition to the crèche, the display included "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that rea[d] 'SEASONS GREETINGS.'" *Ibid.* The city owned all the components of the display. Setting up and dismantling the crèche cost the city about $20 a year, and nominal expenses were incurred in lighting the crèche.

The *Lynch* Court began its analysis by stating that Establishment Clause cases call for careful line-drawing: "[N]o fixed, *per se* rule can be framed." *Id.*, at 678. Although de-

claring that it was not willing to be confined to any single test, the Court essentially applied the *Lemon* test, asking "whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion." 465 U. S., at 679 (citing *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971)). In reversing the lower court's decision, which held that inclusion of the crèche in the holiday display violated the Establishment Clause, the Court stressed that the lower court erred in "focusing almost exclusively on the crèche." 465 U. S., at 680. "In so doing, it rejected the city's claim that its reasons for including the crèche are essentially the same as its reasons for sponsoring the display as a whole." *Ibid.* When viewed in the "context of the Christmas Holiday season," the Court reasoned, there was insufficient evidence to suggest that *inclusion* of the crèche as *part* of the holiday display was an effort to advocate a particular religious message. *Ibid.* The Court concluded that Pawtucket had a secular purpose for including the crèche in its Christmas holiday display, namely, "to depict the origins of that Holiday." *Id.*, at 681.

The Court also concluded that inclusion of the crèche in the display did not have the primary effect of advancing religion. "[D]isplay of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums." *Id.*, at 683. Finally, the Court found no excessive entanglement between religion and government. There was "no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the crèche." *Id.*, at 684.

I joined the majority opinion in *Lynch* because, as I read that opinion, it was consistent with the analysis set forth in my separate concurrence, which stressed that "[e]very gov-

ernment practice must be judged in its *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion." *Id.*, at 694 (emphasis added). Indeed, by referring repeatedly to "inclusion of the crèche" in the larger holiday display, *id.*, at 671, 680–682, 686, the *Lynch* majority recognized that the crèche had to be viewed in light of the total display of which it was a part. Moreover, I joined the Court's discussion in Part II of *Lynch* concerning government acknowledgments of religion in American life because, in my view, acknowledgments such as the legislative prayers upheld in *Marsh* v. *Chambers*, 463 U. S. 783 (1983), and the printing of "In God We Trust" on our coins serve the secular purposes of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U. S., at 693 (concurring opinion). Because they serve such secular purposes and because of their "history and ubiquity," such government acknowledgments of religion are not understood as conveying an endorsement of particular religious beliefs. *Ibid.* At the same time, it is clear that "[g]overnment practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny." *Id.*, at 694.

In my concurrence in *Lynch*, I suggested a clarification of our Establishment Clause doctrine to reinforce the concept that the Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Id.*, at 687. The government violates this prohibition if it endorses or disapproves of religion. *Id.*, at 688. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Ibid.* Disapproval of religion conveys the opposite message. Thus, in my view, the central issue in *Lynch* was whether the city of Pawtucket had

endorsed Christianity by displaying a crèche as part of a larger exhibit of traditional secular symbols of the Christmas holiday season.

In *Lynch*, I concluded that the city's display of a crèche in its larger holiday exhibit in a private park in the commercial district had neither the purpose nor the effect of conveying a message of government endorsement of Christianity or disapproval of other religions. The purpose of including the crèche in the larger display was to celebrate the public holiday through its traditional symbols, not to promote the religious content of the crèche. *Id.*, at 691. Nor, in my view, did Pawtucket's display of the crèche along with secular symbols of the Christmas holiday objectively convey a message of endorsement of Christianity. *Id.*, at 692.

For the reasons stated in Part IV of the Court's opinion in these cases, I agree that the crèche displayed on the Grand Staircase of the Allegheny County Courthouse, the seat of county government, conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community. In contrast to the crèche in *Lynch*, which was displayed in a private park in the city's commercial district as part of a broader display of traditional secular symbols of the holiday season, this crèche stands alone in the county courthouse. The display of religious symbols in public areas of core government buildings runs a special risk of "mak[ing] religion relevant, in reality or public perception, to status in the political community." *Lynch*, *supra*, at 692 (concurring opinion). See also *American Jewish Congress* v. *Chicago*, 827 F. 2d 120, 128 (CA7 1987) ("Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore, inevitably creates a clear and strong impression that the local government tacitly endorses

Christianity"). The Court correctly concludes that placement of the central religious symbol of the Christmas holiday season at the Allegheny County Courthouse has the unconstitutional effect of conveying a government endorsement of Christianity.

II

In his separate opinion, JUSTICE KENNEDY asserts that the endorsement test "is flawed in its fundamentals and unworkable in practice." *Post*, at 669 (opinion concurring in judgment in part and dissenting in part). In my view, neither criticism is persuasive. As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message "that religion or a particular religious belief is favored or preferred." *Wallace* v. *Jaffree*, 472 U. S. 38, 70 (1985) (O'CONNOR, J., concurring in judgment); *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 389 (1985). See also Beschle, The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor, 62 Notre Dame L. Rev. 151 (1987); Note, Developments in the Law—Religion and the State, 100 Harv. L. Rev. 1606, 1647 (1987) (Developments in the Law). We live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.

An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization, *post*, at 659–662, 664–665, but fails to take account of the numerous more subtle ways that government can show favor-

itism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis. See, *e. g.*, *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 786 (1973) ("[W]hile proof of coercion might provide a basis for a claim under the Free Exercise Clause, it [is] not a necessary element of any claim under the Establishment Clause"); *Engel* v. *Vitale*, 370 U. S. 421, 430 (1962). To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy. See *Abington School District* v. *Schempp*, 374 U. S. 203, 223 (1963) ("The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended"). See also Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 922 (1986) ("If coercion is also an element of the establishment clause, establishment adds nothing to free exercise"). Moreover, as even JUSTICE KENNEDY recognizes, any Establishment Clause test limited to "*direct* coercion" clearly would fail to account for forms of "[s]ymbolic recognition or accommodation of religious faith" that may violate the Establishment Clause. *Post*, at 661.

I continue to believe that the endorsement test asks the right question about governmental practices challenged on Establishment Clause grounds, including challenged practices involving the display of religious symbols. Moreover, commentators in the scholarly literature have found merit in the approach. See, *e. g.*, Beschle, *supra*, at 174; Comment, *Lemon* Reconstituted: Justice O'Connor's Proposed Modifications of the *Lemon* Test for Establishment Clause Violations, 1986 B. Y. U. L. Rev. 465; Marshall, "We Know It When We

See It": The Supreme Court and Establishment, 59 S. Cal. L. Rev. 495 (1986); Developments in the Law 1647. I also remain convinced that the endorsement test is capable of consistent application. Indeed, it is notable that the three Courts of Appeals that have considered challenges to the display of a crèche standing alone at city hall have each concluded, relying in part on endorsement analysis, that such a practice sends a message to nonadherents of Christianity that they are outsiders in the political community. See 842 F. 2d 655 (CA3 1988); *American Jewish Congress* v. *Chicago*, 827 F. 2d 120, 127–128 (CA7 1987); *ACLU* v. *Birmingham*, 791 F. 2d 1561, 1566–1567 (CA6), cert. denied, 479 U. S. 939 (1986). See also *Friedman* v. *Board of County Commissioners of Bernalillo County*, 781 F. 2d 777, 780–782 (CA10 1985) (en banc) (county seal including Latin cross and Spanish motto translated as "With This We Conquer," conveys a message of endorsement of Christianity), cert. denied, 476 U. S. 1169 (1986). To be sure, the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results with unanimous agreement at the margins. But that is true of many standards in constitutional law, and even the modified coercion test offered by JUSTICE KENNEDY involves judgment and hard choices at the margin. He admits as much by acknowledging that the permanent display of a Latin cross at city hall would violate the Establishment Clause, as would the display of symbols of Christian holidays alone. *Post*, at 661, 664–665, n. 3. Would the display of a Latin cross for six months have such an unconstitutional effect, or the display of the symbols of most Christian holidays and one Jewish holiday? Would the Christmastime display of a crèche inside a courtroom be "coercive" if subpoenaed witnesses had no opportunity to "turn their backs" and walk away? *Post*, at 664. Would displaying a crèche in front of a public school violate the Establishment Clause under JUSTICE KENNEDY's test?

We cannot avoid the obligation to draw lines, often close and difficult lines, in deciding Establishment Clause cases, and that is not a problem unique to the endorsement test.

JUSTICE KENNEDY submits that the endorsement test is inconsistent with our precedents and traditions because, in his words, if it were "applied without artificial exceptions for historical practice," it would invalidate many traditional practices recognizing the role of religion in our society. *Post*, at 670. This criticism shortchanges both the endorsement test itself and my explanation of the reason why certain long-standing government acknowledgments of religion do not, under that test, convey a message of endorsement. Practices such as legislative prayers or opening Court sessions with "God save the United States and this honorable Court" serve the secular purposes of "solemnizing public occasions" and "expressing confidence in the future," *Lynch*, 465 U. S., at 693 (concurring opinion). These examples of ceremonial deism do not survive Establishment Clause scrutiny simply by virtue of their historical longevity alone. Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment. As we recognized in *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664, 678 (1970): "[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."

Under the endorsement test, the "history and ubiquity" of a practice is relevant not because it creates an "artificial exception" from that test. On the contrary, the "history and ubiquity" of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion. It is the combination of the

longstanding existence of practices such as opening legislative sessions with legislative prayers or opening Court sessions with "God save the United States and this honorable Court," as well as their nonsectarian nature, that leads me to the conclusion that those particular practices, despite their religious roots, do not convey a message of endorsement of particular religious beliefs. See *Lynch*, *supra*, at 693 (concurring opinion); Developments in the Law 1652–1654. Similarly, the celebration of Thanksgiving as a public holiday, despite its religious origins, is now generally understood as a celebration of patriotic values rather than particular religious beliefs. The question under endorsement analysis, in short, is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time. See L. Tribe, American Constitutional Law 1294–1296 (2d ed. 1988). Although the endorsement test requires careful and often difficult line-drawing and is highly context specific, no alternative test has been suggested that captures the essential mandate of the Establishment Clause as well as the endorsement test does, and it warrants continued application and refinement.

Contrary to JUSTICE KENNEDY's assertions, neither the endorsement test nor its application in these cases reflects "an unjustified hostility toward religion." *Post*, at 655. See also *post*, at 663, 667–678. Instead, the endorsement standard recognizes that the religious liberty so precious to the citizens who make up our diverse country is protected, not impeded, when government avoids endorsing religion or favoring particular beliefs over others. Clearly, the government can *acknowledge* the role of religion in our society in numerous ways that do not amount to an endorsement. See *Lynch*, *supra*, at 693 (concurring opinion). Moreover, the government can *accommodate* religion by lifting government-imposed burdens on religion. See *Wallace* v. *Jaffree*, 472

U. S., at 83–84 (opinion concurring in judgment). Indeed, the Free Exercise Clause may mandate that it do so in particular cases. In cases involving the lifting of government burdens on the free exercise of religion, a reasonable observer would take into account the values underlying the Free Exercise Clause in assessing whether the challenged practice conveyed a message of endorsement. *Id.*, at 83. By "build[ing] on the concerns at the core of nonestablishment doctrine and recogniz[ing] the role of accommodations in furthering free exercise," the endorsement test "provides a standard capable of consistent application and avoids the criticism levelled against the *Lemon* test." Rostain, Permissible Accommodations of Religion: Reconsidering the New York *Get* Statute, 96 Yale L. J. 1147, 1159–1160 (1987). The cases before the Court today, however, do not involve lifting a governmental burden on the free exercise of religion. By repeatedly using the terms "acknowledgment" of religion and "accommodation" of religion interchangeably, however, *post*, at 662–664, 670, 678, JUSTICE KENNEDY obscures the fact that the displays at issue in these cases were not placed at city hall in order to remove a government-imposed burden on the free exercise of religion. Christians remain free to display their crèches at their homes and churches. *Ante*, at 601, n. 51. Allegheny County has neither placed nor removed a governmental burden on the free exercise of religion but rather, for the reasons stated in Part IV of the Court's opinion, has conveyed a message of governmental endorsement of Christian beliefs. This the Establishment Clause does not permit.

III

For reasons which differ somewhat from those set forth in Part VI of JUSTICE BLACKMUN's opinion, I also conclude that the city of Pittsburgh's combined holiday display of a Chanukah menorah, a Christmas tree, and a sign saluting liberty does not have the effect of conveying an endorsement of religion. I agree with JUSTICE BLACKMUN, *ante*, at 616–617,

that the Christmas tree, whatever its origins, is not regarded today as a religious symbol. Although Christmas is a public holiday that has both religious and secular aspects, the Christmas tree is widely viewed as a secular symbol of the holiday, in contrast to the crèche which depicts the holiday's religious dimensions. A Christmas tree displayed in front of city hall, in my view, cannot fairly be understood as conveying government endorsement of Christianity. Although JUSTICE BLACKMUN's opinion acknowledges that a Christmas tree alone conveys no endorsement of Christian beliefs, it formulates the question posed by Pittsburgh's combined display of the tree and the menorah as whether the display "has the effect of endorsing *both* Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society." *Ante*, at 616 (emphasis added).

That formulation of the question disregards the fact that the Christmas tree is a predominantly secular symbol and, more significantly, obscures the religious nature of the menorah and the holiday of Chanukah. The opinion is correct to recognize that the religious holiday of Chanukah has historical and cultural as well as religious dimensions, and that there may be certain "secular aspects" to the holiday. But that is not to conclude, however, as JUSTICE BLACKMUN seems to do, that Chanukah has become a "secular holiday" in our society. *Ante*, at 615. The Easter holiday celebrated by Christians may be accompanied by certain "secular aspects" such as Easter bunnies and Easter egg hunts; but it is nevertheless a religious holiday. Similarly, Chanukah is a religious holiday with strong historical components particularly important to the Jewish people. Moreover, the menorah is the central religious symbol and ritual object of that religious holiday. Under JUSTICE BLACKMUN's view, however, the menorah "has been relegated to the role of a neutral harbinger of the holiday season," *Lynch*, 465 U. S., at 727

(BLACKMUN, J., dissenting), almost devoid of any religious significance. In my view, the relevant question for Establishment Clause purposes is whether the city of Pittsburgh's display of the menorah, the religious symbol of a religious holiday, next to a Christmas tree and a sign saluting liberty sends a message of government endorsement of Judaism or whether it sends a message of pluralism and freedom to choose one's own beliefs.

In characterizing the message conveyed by this display as either a "double endorsement" or a secular acknowledgment of the winter holiday season, the opinion states that "[i]t is distinctly implausible to view the combined display of the tree, the sign, and the menorah as endorsing Jewish faith alone." *Ante*, at 616, n. 64. That statement, however, seems to suggest that it would be implausible for the city to endorse a faith adhered to by a minority of the citizenry. Regardless of the plausibility of a putative governmental purpose, the more important inquiry here is whether the governmental display of a minority faith's religious symbol could ever reasonably be understood to convey a message of endorsement of that faith. A menorah standing alone at city hall may well send such a message to nonadherents, just as in this case the crèche standing alone at the Allegheny County Courthouse sends a message of governmental endorsement of Christianity, whatever the county's purpose in authorizing the display may have been. Thus, the question here is whether Pittsburgh's holiday display conveys a message of endorsement of Judaism, when the menorah is the only religious symbol in the combined display and when the opinion acknowledges that the tree cannot reasonably be understood to convey an endorsement of Christianity. One need not characterize Chanukah as a "secular" holiday or strain to argue that the menorah has a "secular" dimension, *ante*, at 587, n. 34, in order to conclude that the city of Pittsburgh's combined display does not convey a message of endorsement of Judaism or of religion in general.

In setting up its holiday display, which included the lighted tree and the menorah, the city of Pittsburgh stressed the theme of liberty and pluralism by accompanying the exhibit with a sign bearing the following message: "'During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom.'" *Ante*, at 582. This sign indicates that the city intended to convey its own distinctive message of pluralism and freedom. By accompanying its display of a Christmas tree—a secular symbol of the Christmas holiday season—with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season. "Although the religious and indeed sectarian significance" of the menorah "is not neutralized by the setting," *Lynch*, 465 U. S., at 692 (concurring opinion), this particular physical setting "changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Ibid.*

The message of pluralism conveyed by the city's combined holiday display is not a message that endorses religion over nonreligion. Just as government may not favor particular religious beliefs over others, "government may not favor religious belief over disbelief." *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1, 27 (1989) (BLACKMUN, J., concurring in judgment); *Wallace* v. *Jaffree*, 472 U. S., at 52–54; *id.*, at 70 (O'CONNOR, J., concurring in judgment). Here, by displaying a secular symbol of the Christmas holiday season rather than a religious one, the city acknowledged a public holiday celebrated by both religious and nonreligious citizens alike, and it did so without endorsing Christian beliefs. A reasonable observer would, in my view, appreciate that the com-

bined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens. In short, in the holiday context, this combined display in its particular physical setting conveys neither an endorsement of Judaism or Christianity nor disapproval of alternative beliefs, and thus does not have the impermissible effect of "mak[ing] religion relevant, in reality or public perception, to status in the political community." *Lynch*, *supra*, at 692 (concurring opinion).

My conclusion does not depend on whether or not the city had "a more secular alternative symbol" of Chanukah, *ante*, at 618, just as the Court's decision in *Lynch* clearly did not turn on whether the city of Pawtucket could have conveyed its tribute to the Christmas holiday season by using a "less religious" alternative to the crèche symbol in its display of traditional holiday symbols. See *Lynch*, *supra*, at 681, n. 7 ("JUSTICE BRENNAN argues that the city's objectives could have been achieved without including the crèche in the display, [465 U. S.,] at 699. True or not, that is irrelevant. The question is whether the display of the crèche violates the Establishment Clause"). In my view, JUSTICE BLACKMUN's new rule, *ante*, at 618, that an inference of endorsement arises every time government uses a symbol with religious meaning if a "more secular alternative" is available is too blunt an instrument for Establishment Clause analysis, which depends on sensitivity to the context and circumstances presented by each case. Indeed, the opinion appears to recognize the importance of this contextual sensitivity by creating an exception to its new rule in the very case announcing it: the opinion acknowledges that "a purely secular symbol" of Chanukah is available, namely, a dreidel or four-sided top, but rejects the use of such a symbol because it "might be interpreted by some as mocking the celebration of Chanukah." *Ibid.* This recognition that the more *religious*

alternative may, depending on the circumstances, convey a message that is least likely to implicate Establishment Clause concerns is an excellent example of the need to focus on the specific practice in question in its particular physical setting and context in determining whether government has conveyed or attempted to convey a message that religion or a particular religious belief is favored or preferred.

In sum, I conclude that the city of Pittsburgh's combined holiday display had neither the purpose nor the effect of endorsing religion, but that Allegheny County's crèche display had such an effect. Accordingly, I join Parts I, II, III–A, IV, V, and VII of the Court's opinion and concur in the judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, concurring in part and dissenting in part.

I have previously explained at some length my views on the relationship between the Establishment Clause and government-sponsored celebrations of the Christmas holiday. See *Lynch* v. *Donnelly*, 465 U. S. 668, 694–726 (1984) (dissenting opinion). I continue to believe that the display of an object that "retains a specifically Christian [or other] religious meaning," *id.*, at 708, is incompatible with the separation of church and state demanded by our Constitution. I therefore agree with the Court that Allegheny County's display of a crèche at the county courthouse signals an endorsement of the Christian faith in violation of the Establishment Clause, and join Parts III–A, IV, and V of the Court's opinion. I cannot agree, however, that the city's display of a 45-foot Christmas tree and an 18-foot Chanukah menorah at the entrance to the building housing the mayor's office shows no favoritism towards Christianity, Judaism, or both. Indeed, I should have thought that the answer as to the first display supplied the answer to the second.

According to the Court, the crèche display sends a message endorsing Christianity because the crèche itself bears a

religious meaning, because an angel in the display carries a banner declaring "Glory to God in the highest!," and because the floral decorations surrounding the crèche highlight it rather than secularize it. The display of a Christmas tree and Chanukah menorah, in contrast, is said to show no endorsement of a particular faith or faiths, or of religion in general, because the Christmas tree is a secular symbol which brings out the secular elements of the menorah. *Ante*, at 616–617. And, JUSTICE BLACKMUN concludes, even though the menorah has religious aspects, its display reveals no endorsement of religion because no other symbol could have been used to represent the secular aspects of the holiday of Chanukah without mocking its celebration. *Ante*, at 618. Rather than endorsing religion, therefore, the display merely demonstrates that "Christmas is not the only traditional way of observing the winter-holiday season," and confirms our "cultural diversity." *Ante*, at 617, 619.

Thus, the decision as to the menorah rests on three premises: the Christmas tree is a secular symbol; Chanukah is a holiday with secular dimensions, symbolized by the menorah; and the government may promote pluralism by sponsoring or condoning displays having strong religious associations on its property. None of these is sound.

I

The first step toward JUSTICE BLACKMUN's conclusion is the claim that, despite its religious origins, the Christmas tree is a secular symbol. He explains:

> "The Christmas tree, unlike the menorah, is not itself a religious symbol. Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas. Numerous Americans place Christmas trees in their homes without subscribing to Christian religious beliefs, and when the city's tree stands alone in front of the City-County Building, it is not considered an endorsement of Christian faith. In-

deed, a 40-foot Christmas tree was one of the objects that validated the crèche in *Lynch*. The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas holiday season serves to emphasize the secular component of the message communicated by other elements of an accompanying holiday display, including the Chanukah menorah." *Ante*, at 616–617 (citations and footnotes omitted).

JUSTICE O'CONNOR accepts this view of the Christmas tree because, "whatever its origins, [it] is not regarded today as a religious symbol. Although Christmas is a public holiday that has both religious and secular aspects, the Christmas tree is widely viewed as a secular symbol of the holiday, in contrast to the crèche which depicts the holiday's religious dimensions." *Ante*, at 633.

Thus, while acknowledging the religious origins of the Christmas tree, JUSTICES BLACKMUN and O'CONNOR dismiss their significance. In my view, this attempt to take the "Christmas" out of the Christmas tree is unconvincing. That the tree may, without controversy, be deemed a secular symbol if found alone does not mean that it will be so seen when combined with other symbols or objects. Indeed, JUSTICE BLACKMUN admits that "the tree is capable of taking on a religious significance if it is decorated with religious symbols." *Ante*, at 617, n. 65.

The notion that the Christmas tree is necessarily secular is, indeed, so shaky that, despite superficial acceptance of the idea, JUSTICE O'CONNOR does not really take it seriously. While conceding that the "menorah standing alone at city hall may well send" a message of endorsement of the Jewish faith, she nevertheless concludes: "By accompanying its display of a Christmas tree—a secular symbol of the Christmas holiday season—with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a mes-

sage of pluralism and freedom of belief during the holiday season." *Ante*, at 635. But the "pluralism" to which JUSTICE O'CONNOR refers is *religious* pluralism, and the "freedom of belief" she emphasizes is freedom of *religious* belief.* The display of the tree and the menorah will symbolize such pluralism and freedom only if more than one religion is represented; if only Judaism is represented, the scene is about Judaism, not about pluralism. Thus, the pluralistic message JUSTICE O'CONNOR stresses *depends on* the tree's possessing some religious significance.

In asserting that the Christmas tree, regardless of its surroundings, is a purely secular symbol, JUSTICES BLACKMUN and O'CONNOR ignore the precept they otherwise so enthusiastically embrace: that context is all important in determining the message conveyed by particular objects. See *ante*, at 597 (BLACKMUN, J.) (relevant question is "whether the

*If it is not religious pluralism that the display signifies, then I do not know what kind of "pluralism" JUSTICE O'CONNOR has in mind. Perhaps she means the cultural pluralism that results from recognition of many different holidays, religious and nonreligious. In that case, however, the display of a menorah next to a giant firecracker, symbolic of the Fourth of July, would seem to be equally representative of this pluralism, yet I do not sense that this display would pass muster under JUSTICE O'CONNOR's view. If, instead, JUSTICE O'CONNOR means to approve the pluralistic message associated with a symbolic display that may stand for either the secular or religious aspects of a given holiday, then this view would logically entail the conclusion that the display of a Latin cross next to an Easter bunny in the springtime would be valid under the Establishment Clause; again, however, I sense that such a conclusion would not comport with JUSTICE O'CONNOR's views. The final possibility, and the one that seems most consonant with the views outlined in her opinion, see *ante*, at 635, is that the pluralism that JUSTICE O'CONNOR perceives in Pittsburgh's display arises from the recognition that there are many different ways to celebrate "the winter holiday season," *ante*, at 636. But winter is "*the* holiday season" to Christians, not to Jews, and the implicit message that it, rather than autumn, is the time for pluralism sends an impermissible signal that only holidays stemming from Christianity, not those arising from other religions, favorably dispose the government towards "pluralism." See *infra*, at 645.

display of the crèche and the menorah, in their respective 'particular physical settings,' has the effect of endorsing or disapproving religious beliefs") (quoting *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 390 (1985)); *ante*, at 624 (O'CONNOR, J.) ("'[E]very government practice must be judged in its *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion'") (quoting *Lynch* v. *Donnelly*, 465 U. S., at 694 (O'CONNOR, J., concurring)); *ante*, at 636 (O'CONNOR, J.) ("Establishment Clause analysis . . . depends on sensitivity to the context and circumstances presented by each case"); *ante*, at 637 (O'CONNOR, J.) (emphasizing "the need to focus on the specific practice in question in its particular physical setting and context"). In analyzing the symbolic character of the Christmas tree, both JUSTICES BLACKMUN and O'CONNOR abandon this contextual inquiry. In doing so, they go badly astray.

Positioned as it was, the Christmas tree's religious significance was bound to come to the fore. Situated next to the menorah—which, JUSTICE BLACKMUN acknowledges, is "a symbol with religious meaning," *ante*, at 618, and indeed, is "the central religious symbol and ritual object of" Chanukah, *ante*, at 633 (O'CONNOR, J.)—the Christmas tree's religious dimension could not be overlooked by observers of the display. Even though the tree alone may be deemed predominantly secular, it can hardly be so characterized when placed next to such a forthrightly religious symbol. Consider a poster featuring a star of David, a statue of Buddha, a Christmas tree, a mosque, and a drawing of Krishna. There can be no doubt that, when found in such company, the tree serves as an unabashedly religious symbol.

JUSTICE BLACKMUN believes that it is the tree that changes the message of the menorah, rather than the menorah that alters our view of the tree. After the abrupt dismissal of the suggestion that the flora surrounding the crèche might have diluted the religious character of the display at the county courthouse, *ante*, at 599, his quick conclusion that

the Christmas tree had a secularizing effect on the menorah is surprising. The distinguishing characteristic, it appears, is the size of the tree. The tree, we are told, is much taller—2½ times taller, in fact—than the menorah, and is located directly under one of the building's archways, whereas the menorah "is positioned to one side . . . [i]n the shadow of the tree." *Ante*, at 617.

As a factual matter, it seems to me that the sight of an 18-foot menorah would be far more eye catching than that of a rather conventionally sized Christmas tree. It also seems to me likely that the symbol with the more singular message will predominate over one lacking such a clear meaning. Given the homogenized message that JUSTICE BLACKMUN associates with the Christmas tree, I would expect that the menorah, with its concededly religious character, would tend to dominate the tree. And, though JUSTICE BLACKMUN shunts the point to a footnote at the end of his opinion, *ante*, at 621, n. 70, it is highly relevant that the menorah was lit during a religious ceremony complete with traditional religious blessings. I do not comprehend how the failure to challenge separately this portion of the city's festivities precludes us from considering it in assessing the message sent by the display as a whole. But see *ibid.* With such an openly religious introduction, it is most likely that the religious aspects of the menorah would be front and center in this display.

I would not, however, presume to say that my interpretation of the tree's significance is the "correct" one, or the one shared by most visitors to the City-County Building. I do not know how we can decide whether it was the tree that stripped the religious connotations from the menorah, or the menorah that laid bare the religious origins of the tree. Both are reasonable interpretations of the scene the city presented, and thus both, I think, should satisfy JUSTICE BLACKMUN's requirement that the display "be judged according to the standard of a 'reasonable observer.'" *Ante*, at 620. I

shudder to think that the only "reasonable observer" is one who shares the particular views on perspective, spacing, and accent expressed in JUSTICE BLACKMUN's opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law.

II

The second premise on which today's decision rests is the notion that Chanukah is a partly secular holiday, for which the menorah can serve as a secular symbol. It is no surprise and no anomaly that Chanukah has historical and societal roots that range beyond the purely religious. I would venture that most, if not all, major religious holidays have beginnings and enjoy histories studded with figures, events, and practices that are not strictly religious. It does not seem to me that the mere fact that Chanukah shares this kind of background makes it a secular holiday in any meaningful sense. The menorah is indisputably a religious symbol, used ritually in a celebration that has deep religious significance. That, in my view, is all that need be said. Whatever secular practices the holiday of Chanukah has taken on in its contemporary observance are beside the point.

Indeed, at the very outset of his discussion of the menorah display, JUSTICE BLACKMUN recognizes that the menorah is a religious symbol. *Ante*, at 613. That should have been the end of the case. But, as did the Court in *Lynch*, JUSTICE BLACKMUN, "by focusing on the holiday 'context' in which the [menorah] appeared, seeks to explain away the clear religious import of the [menorah] . . . ." 465 U. S., at 705 (BRENNAN, J., dissenting). By the end of the opinion, the menorah has become but a coequal symbol, with the Christmas tree, of "the winter-holiday season." *Ante*, at 620. Pittsburgh's secularization of an inherently religious symbol, aided and abetted here by JUSTICE BLACKMUN's opinion, recalls the effort in *Lynch* to render the crèche a secular symbol. As I said then: "To suggest, as the Court does, that such a symbol

is merely 'traditional' and therefore no different from Santa's house or reindeer is not only offensive to those for whom the crèche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of 'history' nor an unavoidable element of our national 'heritage.'" 465 U. S., at 711–712. As JUSTICE O'CONNOR rightly observes, JUSTICE BLACKMUN "obscures the religious nature of the menorah and the holiday of Chanukah." *Ante*, at 633.

I cannot, in short, accept the effort to transform an emblem of religious faith into the innocuous "symbol for a holiday that . . . has both religious and secular dimensions." *Ante*, at 614 (BLACKMUN, J.).

III

JUSTICE BLACKMUN, in his acceptance of the city's message of "diversity," *ante*, at 619, and, even more so, JUSTICE O'CONNOR, in her approval of the "message of pluralism and freedom to choose one's own beliefs," *ante*, at 634, appear to believe that, where seasonal displays are concerned, more is better. Whereas a display might be constitutionally problematic if it showcased the holiday of just one religion, those problems vaporize as soon as more than one religion is included. I know of no principle under the Establishment Clause, however, that permits us to conclude that governmental promotion of religion is acceptable so long as one religion is not favored. We have, on the contrary, interpreted that Clause to require neutrality, not just among religions, but between religion and nonreligion. See, *e. g.*, *Everson* v. *Board of Education of Ewing*, 330 U. S. 1, 15 (1947); *Wallace* v. *Jaffree*, 472 U. S. 38, 52–54 (1985).

Nor do I discern the theory under which the government is permitted to appropriate particular holidays and religious objects to its own use in celebrating "pluralism." The message of the sign announcing a "Salute to Liberty" is not religious, but patriotic; the government's use of religion to promote its

own cause is undoubtedly offensive to those whose religious beliefs are not bound up with their attitude toward the Nation.

The uncritical acceptance of a message of religious pluralism also ignores the extent to which even that message may offend. Many religious faiths are hostile to each other, and indeed, refuse even to participate in ecumenical services designed to demonstrate the very pluralism JUSTICES BLACKMUN and O'CONNOR extol. To lump the ritual objects and holidays of religions together without regard to their attitudes toward such inclusiveness, or to decide which religions should be excluded because of the possibility of offense, is not a benign or beneficent celebration of pluralism: it is instead an interference in religious matters precluded by the Establishment Clause.

The government-sponsored display of the menorah alongside a Christmas tree also works a distortion of the Jewish religious calendar. As JUSTICE BLACKMUN acknowledges, "the proximity of Christmas [may] accoun[t] for the social prominence of Chanukah in this country." *Ante*, at 586. It is the proximity of Christmas that undoubtedly accounts for the city's decision to participate in the celebration of Chanukah, rather than the far more significant Jewish holidays of Rosh Hashanah and Yom Kippur. Contrary to the impression the city and JUSTICES BLACKMUN and O'CONNOR seem to create, with their emphasis on "the winter-holiday season," December is not the holiday season for Judaism. Thus, the city's erection alongside the Christmas tree of the symbol of a relatively minor Jewish religious holiday, far from conveying "the city's secular recognition of different traditions for celebrating the winter-holiday season," *ante*, at 620 (BLACKMUN, J.), or "a message of pluralism and freedom of belief," *ante*, at 635 (O'CONNOR, J.), has the effect of promoting a Christianized version of Judaism. The holiday calendar they appear willing to accept revolves exclusively around a Christian holiday. And those religions that have

no holiday at all during the period between Thanksgiving and New Year's Day will not benefit, even in a second-class manner, from the city's once-a-year tribute to "liberty" and "freedom of belief." This is not "pluralism" as I understand it.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and dissenting in part.

Governmental recognition of not one but two religions distinguishes these cases from our prior Establishment Clause cases. It is, therefore, appropriate to reexamine the text and context of the Clause to determine its impact on this novel situation.

Relations between church and state at the end of the 1780's fell into two quite different categories. In several European countries, one national religion, such as the Church of England in Great Britain, was established. The established church typically was supported by tax revenues, by laws conferring privileges only upon members, and sometimes by violent persecution of nonadherents. In contrast, although several American Colonies had assessed taxes to support one chosen faith, none of the newly United States subsidized a single religion. Some States had repealed establishment laws altogether, while others had replaced single establishments with laws providing for nondiscriminatory support of more than one religion.[1]

[1] The history of religious establishments is discussed in, *e. g.*, J. Swomley, Religious Liberty and the Secular State 24–41 (1987) (Swomley). See generally L. Levy, The Establishment Clause (1986) (Levy). One historian describes the situation at the time of the passage of the First Amendment as follows:

"In America there was no establishment of a single church, as in England. Four states had never adopted any establishment practices. Three had abolished their establishments during the Revolution. The remaining six states—Massachusetts, New Hampshire, Connecticut, Maryland, South Carolina, and Georgia—changed to comprehensive or 'multiple' establishments. That is, aid was provided to all churches in each state on a nonpreferential basis, except that the establishment was limited to churches of

It is against this historical backdrop that James Madison, then a Representative from Virginia, rose to the floor of the First Congress on June 8, 1789, and proposed a number of amendments to the Constitution, including the following:

> "The civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established*, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 Annals of Cong. 434 (1789) (emphasis added).

Congressional debate produced several reformulations of the italicized language.[2] One Member suggested the words "Congress shall make no laws *touching religion*," *id.*, at 731 (emphasis added), soon amended to "Congress shall make no law *establishing religion*," *id.*, at 766 (emphasis added). After further alteration, this passage became one of the Religion Clauses of the First Amendment. Ratified in 1791, they state that "Congress shall make no law *respecting an establishment of religion*, or prohibiting the free exercise thereof," U. S. Const., Amdt. 1 (emphasis added).

By its terms the initial draft of the Establishment Clause would have prohibited only the national established church that prevailed in England; multiple establishments, such as existed in six States, would have been permitted. But even

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the Protestant religion in three states and to those of the Christian religion in the other three states. Since there were almost no Catholics in the first group of states, and very few Jews in any state, this meant that the multiple establishment practices included every religious group with enough members to form a church. It was this nonpreferential assistance to organized churches that constituted 'establishment of religion' in 1791, and it was this practice that the amendment forbade Congress to adopt." C. Pritchett, The American Constitution 401 (3d ed. 1977).

[2] For a comprehensive narration of this process, see Levy 75–89. See also, *e. g.*, *Wallace* v. *Jaffree*, 472 U. S. 38, 92–97 (1985) (REHNQUIST, J., dissenting); Swomley 43–49; Drakeman, Religion and the Republic: James Madison and the First Amendment, in James Madison on Religious Liberty 233–235 (R. Alley ed. 1985).

in those States and even among members of the established churches, there was widespread opposition to multiple establishments because of the social divisions they caused.[3] Perhaps in response to this opposition, subsequent drafts broadened the scope of the Establishment Clause from "any national religion" to "religion," a word understood primarily to mean "[v]irtue, as founded upon reverence of God, and expectation of future rewards and punishments," and only secondarily "[a] system of divine faith and worship, as opposite to others." S. Johnson, A Dictionary of the English Language (7th ed. 1785); accord, T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796). Cf. *Frazee* v. *Illinois Dept. of Employment Security*, 489 U. S. 829, 834 (1989) (construing "religion" protected by Free Ex-

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[3] "Other members of the established church also disapproved taxation for religious purposes. One of these, James Sullivan, who was later elected Governor of Massachusetts, wrote about such taxation: 'This glaring piece of religious tyranny was founded upon one or the other of these suppositions: that the church members were more religious, had more understanding, or had a higher privilege than, or a preeminence over those who were not in full communion, or in other words, that their growth in grace or religious requirements, gave them the right of taking and disposing of the property of other people against their consent.'

"The struggle for religious liberty in Massachusetts was the struggle against taxation for religious purposes. In that struggle there was civil disobedience; there were appeals to the Court and to the Crown in faraway England. Societies were organized to fight the tax. Even after some denominations had won the right to be taxed only for their own churches or meetings, they continued to resist the tax, even on the nonpreferential basis by which all organized religious groups received tax funds. Finally, the state senate, which had refused to end establishment, voted in 1831 to submit the issue to the people. The vote, which took place in 1833, was 32,234 for disestablishment to 3,273 for keeping the multiple establishments of religion. It was a 10 to 1 vote, and in 1834 the amendment was made effective by legislation." Swomley 28.

Cf. *Engel* v. *Vitale*, 370 U. S. 421, 432 (1962) ("Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand").

ercise Clause to include "sincerely held religious belief" apart from "membership in an organized religious denomination"). Plainly, the Clause as ratified proscribes federal legislation establishing a number of religions as well as a single national church.[4]

Similarly expanded was the relationship between government and religion that was to be disallowed. Whereas earlier drafts had barred only laws "establishing" or "touching" religion, the final text interdicts all laws "respecting an establishment of religion." This phrase forbids even a partial establishment, *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971); *Engel* v. *Vitale*, 370 U. S. 421, 436 (1962), not only of a particular sect in favor of others, but also of religion in preference to nonreligion, *Wallace* v. *Jaffree*, 472 U. S. 38, 52 (1985). It is also significant that the final draft contains the word "respecting." Like "touching," "respecting" means concerning, or with reference to. But it also means with respect—that is, "reverence," "good will," "regard"—to.[5] Taking into account this richer meaning, the Establishment Clause, in banning laws that concern religion, especially prohibits those that pay homage to religion.

Treatment of a symbol of a particular tradition demonstrates one's attitude toward that tradition. Cf. *Texas* v. *Johnson*, 491 U. S. 397 (1989). Thus the prominent display of religious symbols on government property falls within the compass of the First Amendment, even though interference with personal choices about supporting a church, by means of governmental tithing, was the primary concern in 1791. See *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664, 668 (1970); n. 3, *supra*. Whether the vice in such a display is

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[4] This proscription applies to the States by virtue of the Fourteenth Amendment. *Jaffree*, 472 U. S., at 48–55.

[5] "Respect," as defined in T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796). See S. Johnson, A Dictionary of the English Language (7th ed. 1785); see also The Oxford English Dictionary 733–734 (1989); Webster's Ninth New Collegiate Dictionary 1004 (1988).

characterized as "coercion," see *post*, at 660–661 (KENNEDY, J., concurring in judgment in part and dissenting in part), or "endorsement," see *ante*, at 625 (O'CONNOR, J., concurring in part and concurring in judgment), or merely as state action with the purpose and effect of providing support for specific faiths, cf. *Lemon*, 403 U. S., at 612, it is common ground that this symbolic governmental speech "respecting an establishment of religion" may violate the Constitution.[6] Cf. *Jaffree*, 472 U. S., at 60–61; *Lynch* v. *Donnelly*, 465 U. S. 668 (1984).

In my opinion the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property.[7] There is always a

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[6] The criticism that JUSTICE KENNEDY levels at JUSTICE O'CONNOR's endorsement standard for evaluating symbolic speech, see *post*, at 668–678, is not only "uncharitable," *post*, at 675, but also largely unfounded. *Inter alia*, he neglects to mention that 1 of the 2 articles he cites as disfavoring the endorsement test, *post*, at 669, itself cites no fewer than 16 articles and 1 book lauding the test. See Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 Mich. L. Rev. 266, 274, n. 45 (1987). JUSTICE KENNEDY's preferred "coercion" test, moreover, is, as he himself admits, *post*, at 660, out of step with our precedent. The Court has stated:

"The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *Engel*, 370 U. S., at 430.

Even if the law were not so, it seems unlikely that "coercion" identifies the line between permissible and impermissible religious displays any more brightly than does "endorsement."

[7] In a similar vein, we have interpreted the Amendment's strictly worded Free Speech and Free Press Clauses to raise a strong presumption against, rather than to ban outright, state abridgment of communications. See, *e. g.*, *Roaden* v. *Kentucky*, 413 U. S. 496, 504 (1973). By suggesting such a presumption plays a role in considering governmental symbolic speech about religion, I do not retreat from my position that a "'high and impregnable' wall" should separate government funds from parochial schools' treasuries. See *Committee for Public Education and Religious*

risk that such symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful. Some devout Christians believe that the crèche should be placed only in reverential settings, such as a church or perhaps a private home; they do not countenance its use as an aid to commercialization of Christ's birthday. Cf. *Lynch*, 465 U. S., at 726–727 (BLACKMUN, J., dissenting).[8] In this very suit, members of the Jewish faith firmly opposed the use to which the menorah was put by the particular sect that sponsored the display at Pittsburgh's City-County Building.[9] Even though "[p]assersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs," see *post*, at 664 (KENNEDY, J., concurring in judgment in part and dissenting in part), displays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal. The Establishment Clause does not allow public bodies to foment such disagreement.[10]

Liberty v. *Regan*, 444 U. S. 646, 671 (1980) (STEVENS, J., dissenting) (quoting *Everson* v. *Board of Education of Ewing*, 330 U. S. 1, 18 (1947)).

[8] The point is reiterated here by *amicus* the Governing Board of the National Council of Churches of Christ in the U. S. A., which argues that "government acceptance of a crèche on public property . . . secularizes and degrades a sacred symbol of Christianity," Brief for American Jewish Committee et al. as *Amici Curiae* ii. See also *Engel*, 370 U. S., at 431. Indeed two Roman Catholics testified before the District Court in this case that the crèche display offended them. App. 79–80, 93–96.

[9] See Brief for American Jewish Committee et al. as *Amici Curiae* i–ii; Brief for American Jewish Congress et al. as *Amici Curiae* 1–2; Tr. of Oral Arg. 44.

[10] These cases illustrate the danger that governmental displays of religious symbols may give rise to unintended divisiveness, for the net result of the Court's disposition is to disallow the display of the crèche but to allow the display of the menorah. Laypersons unfamiliar with the intricacies of Establishment Clause jurisprudence may reach the wholly unjustified conclusion that the Court itself is preferring one faith over another. See *Goldman* v. *Weinberger*, 475 U. S. 503, 512–513 (1986) (STEVENS, J.,

Application of a strong presumption against the public use of religious symbols scarcely will "require a relentless extirpation of all contact between government and religion," see *post*, at 657 (KENNEDY, J., concurring in judgment in part and dissenting in part),[11] for it will prohibit a display only when its message, evaluated in the context in which it is presented, is nonsecular.[12] For example, a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does "the permanent erection of a large Latin cross on the roof of city hall." See *post*, at 661 (KENNEDY, J., concurring in judgment in part and dissenting in part). Cf. *Stone* v. *Graham*, 449 U. S. 39 (1980) *(per curiam)*. Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not

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concurring). Cf. *Lemon* v. *Kurtzman*, 403 U. S. 602, 623 (1971) ("[T]he Constitution's authors sought to protect religious worship from the pervasive power of government"); *Engel*, 370 U. S., at 430 ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause").

[11] The suggestion that the only alternative to governmental support of religion is governmental hostility to it represents a giant step backward in our Religion Clause jurisprudence. Indeed in its first contemporary examination of the Establishment Clause, the Court, while differing on how to apply the principle, unanimously agreed that government could not require believers or nonbelievers to support religions. *Everson* v. *Board of Education of Ewing*, 330 U. S., at 15–16; see also *id.*, at 31–33 (Rutledge, J., dissenting). Accord, *Jaffree*, 472 U. S., at 52–55.

[12] Cf. *New York* v. *Ferber*, 458 U. S. 747, 778 (1982) (STEVENS, J., concurring in judgment) ("The question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context").

for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom,[13] as it would to exclude religious paintings by Italian Renaissance masters from a public museum. Cf. *Lynch*, 465 U. S., at 712–713, 717 (BRENNAN, J., dissenting). Far from "border[ing] on latent hostility toward religion," see *post*, at 657 (KENNEDY, J., concurring in judgment in part and dissenting in part), this careful consideration of context gives due regard to religious and nonreligious members of our society.[14]

Thus I find wholly unpersuasive JUSTICE KENNEDY's attempts, *post*, at 664–667, to belittle the importance of the obvious differences between the display of the crèche in this case and that in *Lynch* v. *Donnelly*, 465 U. S. 668 (1984). Even if I had not dissented from the Court's conclusion that the crèche in *Lynch* was constitutional, I would conclude that Allegheny County's unambiguous exposition of a sacred symbol inside its courthouse promoted Christianity to a degree

[13] All these leaders, of course, appear in friezes on the walls of our courtroom. See The Supreme Court of the United States 31 (published with the cooperation of the Historical Society of the Supreme Court of the United States).

[14] The Court long ago rejected a contention similar to that JUSTICE KENNEDY advances today:

"It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion. . . . [Early Americans] knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Engel*, 370 U. S., at 433–435 (footnotes omitted).

that violated the Establishment Clause. Accordingly, I concur in the Court's judgment regarding the crèche for substantially the same reasons discussed in JUSTICE BRENNAN's opinion, which I join, as well as Part IV of JUSTICE BLACKMUN's opinion and Part I of JUSTICE O'CONNOR's opinion.

I cannot agree with the Court's conclusion that the display at Pittsburgh's City-County Building was constitutional. Standing alone in front of a governmental headquarters, a lighted, 45-foot evergreen tree might convey holiday greetings linked too tenuously to Christianity to have constitutional moment. Juxtaposition of this tree with an 18-foot menorah does not make the latter secular, as JUSTICE BLACKMUN contends, *ante*, at 616. Rather, the presence of the Chanukah menorah, unquestionably a religious symbol,[15] gives religious significance to the Christmas tree. The overall display thus manifests governmental approval of the Jewish and Christian religions. Cf. *Jaffree*, 472 U. S., at 60–61 (quoting *Lynch*, 465 U. S., at 690–691 (O'CONNOR, J., con-

[15] After the judge and counsel for both sides agreed at a preliminary injunction hearing that the menorah was a religious symbol, App. 144–145, a rabbi testified as an expert witness that the menorah and the crèche "are comparable symbols, that they both represent what we perceive to be miracles," *id.*, at 146, and that he had never "heard of Hanukkah being declared a general secular holiday in the United States," *id.*, at 148. Although a witness for intervenor Chabad testified at a later hearing that "[w]hen used on Hanukkah in the home it is definitely symbolizing a religious ritual . . . whereas, at other times the menorah can symbolize anything that one wants it to symbolize," *id.*, at 240, he also agreed that lighting the menorah in a public place "probably would" publicize the miracle it represents, *id.*, at 263.

Nonetheless, JUSTICE BLACKMUN attaches overriding secular meaning to the menorah. *Ante*, at 613–616. Contra, *ante*, at 632–634 (O'CONNOR, J., concurring in part and concurring in judgment); *ante*, at 638, 641–643 (BRENNAN, J., concurring in part and dissenting in part); *post*, at 664 (KENNEDY, J., concurring in judgment in part and dissenting in part). He reaches this conclusion only after exhaustive reference, not only to facts of record but primarily to academic treatises, to assess the degrees to which the menorah, the tree, and the crèche are religious or secular. *Ante*, at 579–587, 616.

curring)). Although it conceivably might be interpreted as sending "a message of pluralism and freedom to choose one's own beliefs," *ante*, at 634 (O'CONNOR, J., concurring in part and concurring in judgment); accord, *ante*, at 617–618 (opinion of BLACKMUN, J.), the message is not sufficiently clear to overcome the strong presumption that the display, respecting two religions to the exclusion of all others, is the very kind of double establishment that the First Amendment was designed to outlaw. I would, therefore, affirm the judgment of the Court of Appeals in its entirety.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA join, concurring in the judgment in part and dissenting in part.

The majority holds that the County of Allegheny violated the Establishment Clause by displaying a crèche in the county courthouse, because the "principal or primary effect" of the display is to advance religion within the meaning of *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971). This view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents, and I dissent from this holding. The crèche display is constitutional, and, for the same reasons, the display of a menorah by the city of Pittsburgh is permissible as well. On this latter point, I concur in the result, but not the reasoning, of Part VI of JUSTICE BLACKMUN's opinion.

I

In keeping with the usual fashion of recent years, the majority applies the *Lemon* test to judge the constitutionality of the holiday displays here in question. I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area. Persuasive criticism of *Lemon* has emerged. See *Edwards* v. *Aguillard*, 482 U. S. 578, 636–640 (1987) (SCALIA, J., dissenting);

Aguilar v. *Felton*, 473 U. S. 402, 426–430 (1985) (O'CONNOR, J., dissenting); *Wallace* v. *Jaffree*, 472 U. S. 38, 108–113 (1985) (REHNQUIST, J., dissenting); *Roemer* v. *Maryland Bd. of Public Works*, 426 U. S. 736, 768–769 (1976) (WHITE, J., concurring in judgment). Our cases often question its utility in providing concrete answers to Establishment Clause questions, calling it but a "'helpful signpos[t]'" or "'guidelin[e]'" to assist our deliberations rather than a comprehensive test. *Mueller* v. *Allen*, 463 U. S. 388, 394 (1983) (quoting *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973)); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 773, n. 31 (1973) (quoting *Tilton* v. *Richardson*, 403 U. S. 672, 677–678 (1971)); see *Lynch* v. *Donnelly*, 465 U. S. 668, 679 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area"). Substantial revision of our Establishment Clause doctrine may be in order; but it is unnecessary to undertake that task today, for even the *Lemon* test, when applied with proper sensitivity to our traditions and our case law, supports the conclusion that both the crèche and the menorah are permissible displays in the context of the holiday season.

The only *Lemon* factor implicated in these cases directs us to inquire whether the "principal or primary effect" of the challenged government practice is "one that neither advances nor inhibits religion." 403 U. S., at 612. The requirement of neutrality inherent in that formulation has sometimes been stated in categorical terms. For example, in *Everson* v. *Board of Education of Ewing*, 330 U. S. 1 (1947), the first case in our modern Establishment Clause jurisprudence, Justice Black wrote that the Clause forbids laws "which aid one religion, aid all religions, or prefer one religion over another." *Id.*, at 15–16. We have stated that government "must be neutral in matters of religious theory, doctrine, and practice" and "may not aid, foster, or promote one religion or religious theory against another or even against the

militant opposite." *Epperson* v. *Arkansas*, 393 U. S. 97, 103–104 (1968). And we have spoken of a prohibition against conferring an "'imprimatur of state approval'" on religion, *Mueller* v. *Allen*, *supra*, at 399 (quoting *Widmar* v. *Vincent*, 454 U. S. 263, 274 (1981)), or "favor[ing] the adherents of any sect or religious organization," *Gillette* v. *United States*, 401 U. S. 437, 450 (1971).

These statements must not give the impression of a formalism that does not exist. Taken to its logical extreme, some of the language quoted above would require a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage. As Chief Justice Burger wrote for the Court in *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664 (1970), we must be careful to avoid "[t]he hazards of placing too much weight on a few words or phrases of the Court," and so we have "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Id.*, at 670–671.

Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. *Lynch* v. *Donnelly*, *supra*, at 678; *Walz* v. *Tax Comm'n of New York City*, *supra*, at 669. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious. A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval. In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redi-

rects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

Our cases reflect this understanding. In *Zorach* v. *Clauson*, 343 U. S. 306 (1952), for example, we permitted New York City's public school system to accommodate the religious preferences of its students by giving them the option of staying in school or leaving to attend religious classes for part of the day. Justice Douglas wrote for the Court:

> "When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." *Id.*, at 313–314.

Nothing in the First Amendment compelled New York City to establish the release-time policy in *Zorach*, but the fact that the policy served to aid religion, and in particular those sects that offer religious education to the young, did not invalidate the accommodation. Likewise, we have upheld government programs supplying textbooks to students in parochial schools, *Board of Education of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236 (1968), providing grants to church-sponsored universities and colleges, *Roemer* v. *Maryland Bd. of Public Works*, *supra*; *Tilton* v. *Richardson*, *supra*, and exempting churches from the obligation to pay taxes, *Walz* v. *Tax Comm'n of New York City*, *supra*. These programs all have the effect of providing substantial benefits to particular religions, see, *e. g.*, *Tilton*, *supra*, at 679 (grants to church-sponsored educational institutions "surely aid" those institutions), but they are nonetheless permissible. See *Lynch* v. *Donnelly*, *supra*; *McGowan* v.

Maryland, 366 U. S. 420, 445 (1961); *Illinois ex rel. McCollum* v. *Board of Education of School Dist. No. 71, Champaign County*, 333 U. S. 203, 211–212 (1948). As Justice Goldberg wrote in *Abington School District* v. *Schempp*, 374 U. S. 203 (1963):

> "It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.
>
> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion . . . ." *Id.*, at 306 (concurring opinion, joined by Harlan, J.).

The ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between accommodation and establishment. Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so." *Lynch* v. *Donnelly*, 465 U. S., at 678. These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain

a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.

It is no surprise that without exception we have invalidated actions that further the interests of religion through the coercive power of government. Forbidden involvements include compelling or coercing participation or attendance at a religious activity, see *Engel* v. *Vitale*, 370 U. S. 421 (1962); *McGowan* v. *Maryland*, *supra*, at 452 (discussing *McCollum* v. *Board of Education of School Dist. No. 71, Champaign County*, *supra*), requiring religious oaths to obtain government office or benefits, *Torcaso* v. *Watkins*, 367 U. S. 488 (1961), or delegating government power to religious groups, *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982). The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses. Barring all attempts to aid religion through government coercion goes far toward attainment of this object. See *McGowan* v. *Maryland*, *supra*, at 441, quoting 1 Annals of Congress 730 (1789) (James Madison, who proposed the First Amendment in Congress, "'apprehended the meaning of the [Religion Clauses] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience'"); *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940) (the Religion Clauses "forestal[l] compulsion by law of the acceptance of any creed or the practice of any form of worship").

As JUSTICE BLACKMUN observes, *ante*, at 597–598, n. 47, some of our recent cases reject the view that coercion is the sole touchstone of an Establishment Clause violation. See *Engel* v. *Vitale*, *supra*, at 430 (dictum) (rejecting, without citation of authority, proposition that coercion is required to demonstrate an Establishment Clause violation); *Abington School District* v. *Schempp*, *supra*, at 223; *Nyquist*, 413 U. S., at 786. That may be true if by "coercion" is meant

direct coercion in the classic sense of an establishment of religion that the Framers knew. But coercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case.[1] I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is *per se* suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion. Cf. *Friedman* v. *Board of County Comm'rs of Bernalillo County*, 781 F. 2d 777 (CA10 1985) (en banc) (Latin cross on official county seal); *American Civil Liberties Union of Georgia* v. *Rabun County Chamber of Commerce, Inc.*, 698 F. 2d 1098 (CA11 1983) (cross erected in public park); *Lowe* v. *Eugene*, 254 Ore. 518, 463 P. 2d 360 (1969) (same). Speech may coerce in some circumstances, but this does not justify a ban on all government recognition of religion. As Chief Justice Burger wrote for the Court in *Walz:*

> "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist

[1] JUSTICE STEVENS is incorrect when he asserts that requiring a showing of direct or indirect coercion in Establishment Clause cases is "out of step with our precedent." *Ante*, at 650, n. 6. As is demonstrated by the language JUSTICE STEVENS quotes from *Engel* v. *Vitale*, 370 U. S. 421, 430 (1962), our cases have held only that *direct* coercion need not always be shown to establish an Establishment Clause violation. The prayer invalidated in *Engel* was unquestionably coercive in an indirect manner, as the *Engel* Court itself recognized in the sentences immediately following the passage JUSTICE STEVENS chooses to quote. *Id.*, at 430–431.

without sponsorship and without interference." 397 U. S., at 669.

This is most evident where the government's act of recognition or accommodation is passive and symbolic, for in that instance any intangible benefit to religion is unlikely to present a realistic risk of establishment. Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal. Our cases reflect this reality by requiring a showing that the symbolic recognition or accommodation advances religion to such a degree that it actually "establishes a religion or religious faith, or tends to do so." *Lynch*, 465 U. S., at 678.

In determining whether there exists an establishment, or a tendency toward one, we refer to the other types of church-state contacts that have existed unchallenged throughout our history, or that have been found permissible in our case law. In *Lynch*, for example, we upheld the city of Pawtucket's holiday display of a crèche, despite the fact that "the display advance[d] religion in a sense." *Id.*, at 683. We held that the crèche conferred no greater benefit on religion than did governmental support for religious education, legislative chaplains, "recognition of the origins of the [Christmas] Holiday itself as 'Christ's Mass,'" or many other forms of symbolic or tangible governmental assistance to religious faiths that are ensconced in the safety of national tradition. *Id.*, at 681, 683. And in *Marsh* v. *Chambers*, we found that Nebraska's practice of employing a legislative chaplain did not violate the Establishment Clause, because "legislative prayer presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations." 463 U. S., at 791 (citations omitted). Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way

more direct and more substantial than practices that are accepted in our national heritage.

II

These principles are not difficult to apply to the facts of the cases before us. In permitting the displays on government property of the menorah and the crèche, the city and county sought to do no more than "celebrate the season," Brief for Petitioner County of Allegheny in No. 87–2050, p. 27, and to acknowledge, along with many of their citizens, the historical background and the religious, as well as secular, nature of the Chanukah and Christmas holidays. This interest falls well within the tradition of government accommodation and acknowledgment of religion that has marked our history from the beginning.[2] It cannot be disputed that government, if it chooses, may participate in sharing with its citizens the joy of the holiday season, by declaring public holidays, installing or permitting festive displays, sponsoring celebrations and parades, and providing holiday vacations for its employees. All levels of our government do precisely that. As we said in *Lynch*, "Government has long recognized—indeed it has subsidized—holidays with religious significance." 465 U. S., at 676.

If government is to participate in its citizens' celebration of a holiday that contains both a secular and a religious component, enforced recognition of only the secular aspect would

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[2] The majority rejects the suggestion that the display of the crèche can "be justified as an 'accommodation' of religion," because it "does not remove any burden on the free exercise of Christianity." *Ante*, at 601, n. 51. Contrary to the assumption implicit in this analysis, however, we have never held that government's power to accommodate and recognize religion extends no further than the requirements of the Free Exercise Clause. To the contrary, "[t]he limits of permissible state accommodation to religion are by no means coextensive with the non-interference mandated by the Free Exercise Clause." *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664, 673 (1970). Cf. *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1, 38 (1989) (SCALIA, J., dissenting).

signify the callous indifference toward religious faith that our cases and traditions do not require; for by commemorating the holiday only as it is celebrated by nonadherents, the government would be refusing to acknowledge the plain fact, and the historical reality, that many of its citizens celebrate its religious aspects as well. Judicial invalidation of government's attempts to recognize the religious underpinnings of the holiday would signal not neutrality but a pervasive intent to insulate government from all things religious. The Religion Clauses do not require government to acknowledge these holidays or their religious component; but our strong tradition of government accommodation and acknowledgment permits government to do so. See *Lynch* v. *Donnelly*, *supra;* cf. *Zorach* v. *Clauson*, 343 U. S., at 314; *Abington School District* v. *Schempp*, 374 U. S., at 306 (Goldberg, J., concurring).

There is no suggestion here that the government's power to coerce has been used to further the interests of Christianity or Judaism in any way. No one was compelled to observe or participate in any religious ceremony or activity. Neither the city nor the county contributed significant amounts of tax money to serve the cause of one religious faith. The crèche and the menorah are purely passive symbols of religious holidays. Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.

There is no realistic risk that the crèche and the menorah represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion.[3] *Lynch*

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[3] One can imagine a case in which the use of passive symbols to acknowledge religious holidays could present this danger. For example, if a city chose to recognize, through religious displays, every significant Christian holiday while ignoring the holidays of all other faiths, the argument that the city was simply recognizing certain holidays celebrated by its citizens without establishing an official faith or applying pressure to obtain adher-

is dispositive of this claim with respect to the crèche, and I find no reason for reaching a different result with respect to the menorah. Both are the traditional symbols of religious holidays that over time have acquired a secular component. *Ante*, at 579, and n. 3, 585, and n. 29. Without ambiguity, *Lynch* instructs that "the focus of our inquiry must be on the [religious symbol] in the context of the [holiday] season," 465 U. S., at 679. In that context, religious displays that serve "to celebrate the Holiday and to depict the origins of that Holiday" give rise to no Establishment Clause concern. *Id.*, at 681. If Congress and the state legislatures do not run afoul of the Establishment Clause when they begin each day with a state-sponsored prayer for divine guidance offered by a chaplain whose salary is paid at government expense, I cannot comprehend how a menorah or a crèche, displayed in the limited context of the holiday season, can be invalid.[4]

Respondents say that the religious displays involved here are distinguishable from the crèche in *Lynch* because they are located on government property and are not surrounded

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ents would be much more difficult to maintain. On the facts of these cases, no such unmistakable and continual preference for one faith has been demonstrated or alleged.

[4]The majority suggests that our approval of legislative prayer in *Marsh* v. *Chambers* is to be distinguished from these cases on the ground that legislative prayer is nonsectarian, while crèches and menorahs are not. *Ante*, at 603. In the first place, of course, this purported distinction is utterly inconsistent with the majority's belief that the Establishment Clause "mean[s] no official preference even for religion over nonreligion." *Ante*, at 605. If year-round legislative prayer does not express "official preference for religion over nonreligion," a crèche or menorah display in the context of the holiday season certainly does not "demonstrate a preference for one particular sect or creed." *Ibid.* Moreover, the majority chooses to ignore the Court's opinion in *Lynch* v. *Donnelly*, 465 U. S. 668 (1984), which applied *precisely the same analysis* as that I apply today: "[T]o conclude that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion . . . than . . . the legislative prayers upheld in *Marsh* v. *Chambers* . . . ." *Id.*, at 681–682.

by the candy canes, reindeer, and other holiday paraphernalia that were a part of the display in *Lynch*. Nothing in Chief Justice Burger's opinion for the Court in *Lynch* provides support for these purported distinctions. After describing the facts, the *Lynch* opinion makes no mention of either of these factors. It concentrates instead on the significance of the crèche as part of the entire holiday season. Indeed, it is clear that the Court did not view the secular aspects of the display as somehow subduing the religious message conveyed by the crèche, for the majority expressly rejected the dissenters' suggestion that it sought "'to explain away the clear religious import of the crèche'" or had "equated the crèche with a Santa's house or reindeer." *Id.*, at 685, n. 12. Crucial to the Court's conclusion was not the number, prominence, or type of secular items contained in the holiday display but the simple fact that, when displayed by government during the Christmas season, a crèche presents no realistic danger of moving government down the forbidden road toward an establishment of religion. Whether the crèche be surrounded by poinsettias, talking wishing wells, or carolers, the conclusion remains the same, for the relevant context is not the items in the display itself but the season as a whole.

The fact that the crèche and menorah are both located on government property, even at the very seat of government, is likewise inconsequential. In the first place, the *Lynch* Court did not rely on the fact that the setting for Pawtucket's display was a privately owned park, and it is difficult to suggest that anyone could have failed to receive a message of government sponsorship after observing Santa Claus ride the city fire engine to the park to join with the mayor of Pawtucket in inaugurating the holiday season by turning on the lights of the city-owned display. See *Donnelly* v. *Lynch*, 525 F. Supp. 1150, 1156 (RI 1981). Indeed, the District Court in *Lynch* found that "people might reasonably mistake

the Park for public property," and rejected as "frivolous" the suggestion that the display was not directly associated with the city. *Id.*, at 1176, and n. 35.

Our cases do not suggest, moreover, that the use of public property necessarily converts otherwise permissible government conduct into an Establishment Clause violation. To the contrary, in some circumstances the First Amendment may *require* that government property be available for use by religious groups, see *Widmar* v. *Vincent*, 454 U. S. 263 (1981); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951), and even where not required, such use has long been permitted. The prayer approved in *Marsh* v. *Chambers*, for example, was conducted in the legislative chamber of the State of Nebraska, surely the single place most likely to be thought the center of state authority.

Nor can I comprehend why it should be that placement of a government-owned crèche on private land is lawful while placement of a privately owned crèche on public land is not.[5] If anything, I should have thought government ownership of a religious symbol presented the more difficult question under the Establishment Clause, but as *Lynch* resolved that question to sustain the government action, the sponsorship here ought to be all the easier to sustain. In short, nothing about the religious displays here distinguishes them in any meaningful way from the crèche we permitted in *Lynch*.

If *Lynch* is still good law—and until today it was—the judgment below cannot stand. I accept and indeed approve both the holding and the reasoning of Chief Justice Burger's opinion in *Lynch*, and so I must dissent from the judgment that the crèche display is unconstitutional. On the same reasoning, I agree that the menorah display is constitutional.

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[5] The crèche in *Lynch* was owned by Pawtucket. Neither the crèche nor the menorah at issue in this case is owned by a governmental entity.

III

The majority invalidates display of the crèche, not because it disagrees with the interpretation of *Lynch* applied above, but because it chooses to discard the reasoning of the *Lynch* majority opinion in favor of JUSTICE O'CONNOR's concurring opinion in that case. See *ante*, at 594–597. It has never been my understanding that a concurring opinion "suggest-[ing] a clarification of our . . . doctrine," *Lynch*, 465 U. S., at 687 (O'CONNOR, J., concurring), could take precedence over an opinion joined in its entirety by five Members of the Court.[6] As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law. Since the majority does not state its intent to overrule *Lynch*, I find its refusal to apply the reasoning of that decision quite confusing.

Even if *Lynch* did not control, I would not commit this Court to the test applied by the majority today. The notion that cases arising under the Establishment Clause should be decided by an inquiry into whether a "'reasonable observer'" may "'fairly understand'" government action to "'sen[d] a message to nonadherents that they are outsiders, not full members of the political community,'" is a recent, and in my view most unwelcome, addition to our tangled Establishment Clause jurisprudence. *Ante*, at 595, 620. Although a scattering of our cases have used "endorsement" as another word for "preference" or "*imprimatur*," the endorsement test applied by the majority had its genesis in JUSTICE O'CONNOR's concurring opinion in *Lynch*. See also *Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 346 (1987) (O'CONNOR, J., concurring in judgment); *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703, 711 (1985) (O'CONNOR, J., concurring); *Wal-*

[6] The majority illustrates the depth of its error in this regard by going so far as to refer to the *concurrence* and *dissent* in *Lynch* as "[o]ur previous opinions. . . ." *Ante*, at 602.

lace v. *Jaffree*, 472 U. S., at 67 (O'CONNOR, J., concurring in judgment). The endorsement test has been criticized by some scholars in the field, see, *e. g.*, Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 Mich. L. Rev. 266 (1987); Tushnet, The Constitution of Religion, 18 Conn. Law Rev. 701, 711–712 (1986). Only one opinion for the Court has purported to apply it in full, see *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 389–392 (1985), but the majority's opinion in these cases suggests that this novel theory is fast becoming a permanent accretion to the law. See also *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1, 8–9 (1989) (opinion of BRENNAN, J.). For the reasons expressed below, I submit that the endorsement test is flawed in its fundamentals and unworkable in practice. The uncritical adoption of this standard is every bit as troubling as the bizarre result it produces in the cases before us.

A

I take it as settled law that, whatever standard the Court applies to Establishment Clause claims, it must at least suggest results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment jurisprudence. See *supra*, at 655–663; *Lynch*, *supra*, at 673–674; *Marsh* v. *Chambers*, 463 U. S., at 790–791; *Walz* v. *Tax Comm'n of New York City*, 397 U. S., at 671. It is true that, for reasons quite unrelated to the First Amendment, displays commemorating religious holidays were not commonplace in 1791. See generally J. Barnett, The American Christmas: A Study in National Culture 2–11 (1954). But the relevance of history is not confined to the inquiry into whether the challenged practice itself is a part of our accepted traditions dating back to the Founding.

Our decision in *Marsh* v. *Chambers* illustrates this proposition. The dissent in that case sought to characterize the decision as "carving out an exception to the Establishment

Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer," 463 U. S., at 796 (BRENNAN, J., dissenting), but the majority rejected the suggestion that "historical patterns ca[n] justify contemporary violations of constitutional guarantees," *id.*, at 790. *Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings.[7] Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion. See *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U. S., at 808 (REHNQUIST, J., dissenting in part). The First Amendment is a rule, not a digest or compendium. A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.

If the endorsement test, applied without artificial exceptions for historical practice, reached results consistent with history, my objections to it would have less force. But, as I understand that test, the touchstone of an Establishment Clause violation is whether nonadherents would be made to feel like "outsiders" by government recognition or accommodation of religion. Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of this formula.

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[7] Contrary to the majority's discussion, *ante*, at 604–605, and nn. 53–54, the relevant historical practices are those conducted by governmental units which were subject to the constraints of the Establishment Clause. Acts of "official discrimination against non-Christians" perpetrated in the 18th and 19th centuries by States and municipalities are of course irrelevant to this inquiry, but the practices of past Congresses and Presidents are highly informative.

Some examples suffice to make plain my concerns. Since the Founding of our Republic, American Presidents have issued Thanksgiving Proclamations establishing a national day of celebration and prayer. The first such proclamation was issued by President Washington at the request of the First Congress, and "recommend[ed] and assign[ed]" a day "to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be," so that "we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to . . . promote the knowledge and practice of true religion and virtue . . . ." 1 J. Richardson, A Compilation of Messages and Papers of the Presidents, 1789–1897, p. 64 (1899). Most of President Washington's successors have followed suit,[8] and the forthrightly religious nature of these proclamations has not waned with the years. President Franklin D. Roosevelt went so far as to "suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas" so that "we may bear more earnest witness to our gratitude to Almighty God." Presidential Proclamation No. 2629, 58 Stat. 1160. It requires little imagination to conclude that these proclamations would cause nonadherents to feel excluded, yet they have been a part of our national heritage from the beginning.[9]

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[8] In keeping with his strict views of the degree of separation mandated by the Establishment Clause, Thomas Jefferson declined to follow this tradition. See 11 Writings of Thomas Jefferson 429 (A. Lipscomb ed. 1904).

[9] Similarly, our Presidential inaugurations have traditionally opened with a request for divine blessing. At our most recent such occasion, on January 20, 1989, thousands bowed their heads in prayer to this invocation:

"Our Father and our God, Thou hast said blessed is the nation whose God is the Lord.

"We recognize on this historic occasion that we are a nation under God. This faith in God is our foundation and our heritage. . . .

. . . . . .

The Executive has not been the only Branch of our Government to recognize the central role of religion in our society. The fact that this Court opens its sessions with the request that "God save the United States and this honorable Court" has been noted elsewhere. See *Lynch*, 465 U. S., at 677. The Legislature has gone much further, not only employing legislative chaplains, see 2 U. S. C. § 61d, but also setting aside a special prayer room in the Capitol for use by Members of the House and Senate. The room is decorated with a large stained glass panel that depicts President Washington kneeling in prayer; around him is etched the first verse of the 16th Psalm: "Preserve me, O God, for in Thee do I put my trust." Beneath the panel is a rostrum on which a Bible is placed; next to the rostrum is an American Flag. See L. Aikman, We the People: The Story of the United States Capitol 122 (1978). Some endorsement is inherent in these reasonable accommodations, yet the Establishment Clause does not forbid them.

The United States Code itself contains religious references that would be suspect under the endorsement test. Congress has directed the President to "set aside and proclaim a suitable day each year . . . as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U. S. C. § 169h. This statute does not require anyone to pray, of course, but it is a straightforward endorsement of the concept of "turn[ing] to God in prayer." Also by statute, the Pledge of Allegiance to the Flag describes the United States as "one Nation under God." 36 U. S. C. § 172.

"As George Washington reminded us in his Farewell Address, morality and faith are the pillars of our society. May we never forget that.

. . . . . .

"We acknowledge Thy divine help in the selection of our leadership each 4 years.

. . . . . .

"All this we pray in the name of the Father, the Son, and the Holy Spirit. Amen." 135 Cong. Rec. 303 (1989) (Rev. Billy Graham).

To be sure, no one is obligated to recite this phrase, see *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943), but it borders on sophistry to suggest that the "'reasonable'" atheist would not feel less than a "'full membe[r] of the political community'" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false. Likewise, our national motto, "In God we trust," 36 U. S. C. § 186, which is prominently engraved in the wall above the Speaker's dias in the Chamber of the House of Representatives and is reproduced on every coin minted and every dollar printed by the Federal Government, 31 U. S. C. §§ 5112(d)(1), 5114(b), must have the same effect.

If the intent of the Establishment Clause is to protect individuals from mere feelings of exclusion, then legislative prayer cannot escape invalidation. It has been argued that "[these] government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, *supra*, at 693 (O'CONNOR, J., concurring). I fail to see why prayer is the only way to convey these messages; appeals to patriotism, moments of silence, and any number of other approaches would be as effective, were the only purposes at issue the ones described by the *Lynch* concurrence. Nor is it clear to me why "encouraging the recognition of what is worthy of appreciation in society" can be characterized as a purely secular purpose, if it can be achieved only through religious prayer. No doubt prayer is "worthy of appreciation," but that is most assuredly not because it is secular. Even accepting the secular-solemnization explanation at face value, moreover, it seems incredible to suggest that the average observer of legislative prayer who either believes in no religion or whose faith rejects the concept of God would not receive the clear message that his faith is out of step with the

political norm. Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent.[10] Neither result is acceptable.

B

In addition to disregarding precedent and historical fact, the majority's approach to government use of religious symbolism threatens to trivialize constitutional adjudication. By mischaracterizing the Court's opinion in *Lynch* as an endorsement-in-context test, *ante*, at 597, JUSTICE BLACKMUN embraces a jurisprudence of minutiae. A reviewing court must consider whether the city has included Santas, talking wishing wells, reindeer, or other secular symbols as "a center of attention separate from the crèche." *Ante*, at 598. After determining whether these centers of attention are sufficiently "separate" that each "had their specific visual story to tell," the court must then measure their proximity to the crèche. *Ante*, at 598, and n. 48. A community that wishes to construct a constitutional display must also

[10] If the majority's test were to be applied logically, it would lead to the elimination of all nonsecular Christmas caroling in public buildings or, presumably, anywhere on public property. It is difficult to argue that lyrics like "Good Christian men, rejoice," "Joy to the world! the Savior reigns," "This, this is Christ the King," "Christ, by highest heav'n adored," and "Come and behold Him, Born the King of angels" have acquired such a secular nature that nonadherents would not feel "left out" by a government-sponsored or approved program that included these carols. See W. Ehret & G. Evans, The International Book of Christmas Carols 12, 28, 30, 46, 318 (1963). We do not think for a moment that the Court will ban such carol programs, however. Like Thanksgiving Proclamations, the reference to God in the Pledge of Allegiance, and invocations to God in sessions of Congress and of this Court, they constitute practices that the Court will not proscribe, but that the Court's reasoning today does not explain.

take care to avoid floral frames or other devices that might insulate the crèche from the sanitizing effect of the secular portions of the display. *Ibid.* The majority also notes the presence of evergreens near the crèche that are identical to two small evergreens placed near official county signs. *Ante*, at 600, n. 50. After today's decision, municipal greenery must be used with care.

Another important factor will be the prominence of the setting in which the display is placed. In this case, the Grand Staircase of the county courthouse proved too resplendent. Indeed, the Court finds that this location itself conveyed an "unmistakable message that [the county] supports and promotes the Christian praise to God that is the crèche's religious message." *Ante*, at 600.

My description of the majority's test, though perhaps uncharitable, is intended to illustrate the inevitable difficulties with its application.[11] This test could provide workable guidance to the lower courts, if ever, only after this Court has decided a long series of holiday display cases, using little more than intuition and a tape measure. Deciding cases on

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[11] JUSTICE BLACKMUN and JUSTICE O'CONNOR defend the majority's test by suggesting that the approach followed in *Lynch* would require equally difficult line drawing. *Ante*, at 606; *ante*, at 629–630 (O'CONNOR, J., concurring in part and concurring in judgment). It is true that the *Lynch* test may involve courts in difficult line-drawing in the unusual case where a municipality insists on such extreme use of religious speech that an establishment of religion is threatened. See *supra*, at 661. Only adoption of the absolutist views that either *all* government involvement with religion is permissible, or that *none* is, can provide a bright line in all cases. That price for clarity is neither exacted nor permitted by the Constitution. But for the most part, JUSTICE BLACKMUN's and JUSTICE O'CONNOR's objections are not well taken. As a practical matter, the only cases of symbolic recognition likely to arise with much frequency are those involving simple holiday displays, and in that context *Lynch* provides unambiguous guidance. I would follow it. The majority's test, on the other hand, demands the Court to draw exquisite distinctions from fine detail in a wide range of cases. The anomalous result the test has produced here speaks for itself.

the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication. "It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying they were offended—but would have been less so were the crèche five feet closer to the jumbo candy cane." *American Jewish Congress* v. *Chicago*, 827 F. 2d 120, 130 (CA7 1987) (Easterbrook, J., dissenting).

JUSTICE BLACKMUN employs in many respects a similar analysis with respect to the menorah, principally discussing its proximity to the Christmas tree and whether "it is . . . more sensible to interpret the menorah in light of the tree, rather than vice versa." *Ante*, at 617; see also *ante*, at 635 (O'CONNOR, J., concurring in part and concurring in judgment) (concluding that combination of tree, menorah, and salute to liberty conveys no message of endorsement to reasonable observers). JUSTICE BLACKMUN goes further, however, and in upholding the menorah as an acknowledgment of a holiday with secular aspects emphasizes the city's lack of "reasonable alternatives that are less religious in nature." *Ante*, at 618; see *ibid.* (noting absence of a "more secular alternative symbol"). This least-religious-means test presents several difficulties.[12] First, it creates an internal inconsistency in JUSTICE BLACKMUN's opinion. JUSTICE BLACKMUN earlier suggests that the display of a crèche is sometimes constitutional. *Ante*, at 598. But it is obvious that there are innumerable secular symbols of Christmas, and that there will always be a more secular alternative available in place of a crèche. Second, the test as applied by JUSTICE BLACKMUN is unworkable, for it requires not only that the Court engage in the unfamiliar task of deciding whether a particular alterna-

[12] Of course, a majority of the Court today rejects JUSTICE BLACKMUN's approach in this regard. See *ante*, at 636–637 (O'CONNOR, J., concurring in part and concurring in judgment).

tive symbol is more or less religious, but also whether the alternative would "look out of place." *Ante*, at 618. Third, although JUSTICE BLACKMUN purports not to be overruling *Lynch*, the more-secular-alternative test contradicts that decision, as it comes not from the Court's opinion, nor even from the concurrence, but from the dissent. See 465 U. S., at 699 (BRENNAN, J., dissenting). The Court in *Lynch* noted that the dissent "argues that the city's objectives could have been achieved without including the crèche in the display." *Id.*, at 681, n. 7. "True or false," we said, "that is irrelevant."

The result the Court reaches in these cases is perhaps the clearest illustration of the unwisdom of the endorsement test. Although JUSTICE O'CONNOR disavows JUSTICE BLACKMUN's suggestion that the minority or majority status of a religion is relevant to the question whether government recognition constitutes a forbidden endorsement, *ante*, at 634 (O'CONNOR, J., concurring in part and concurring in judgment), the very nature of the endorsement test, with its emphasis on the feelings of the objective observer, easily lends itself to this type of inquiry. If there be such a person as the "reasonable observer," I am quite certain that he or she will take away a salient message from our holding in these cases: the Supreme Court of the United States has concluded that the First Amendment creates classes of religions based on the relative numbers of their adherents. Those religions enjoying the largest following must be consigned to the status of least favored faiths so as to avoid any possible risk of offending members of minority religions. I would be the first to admit that many questions arising under the Establishment Clause do not admit of easy answers, but whatever the Clause requires, it is not the result reached by the Court today.

IV

The approach adopted by the majority contradicts important values embodied in the Clause. Obsessive, implacable resistance to all but the most carefully scripted and secu-

larized forms of accommodation requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not. What is orthodox, in this context, means what is secular; the only Christmas the State can acknowledge is one in which references to religion have been held to a minimum. The Court thus lends its assistance to an Orwellian rewriting of history as many understand it. I can conceive of no judicial function more antithetical to the First Amendment.

A further contradiction arises from the majority's approach, for the Court also assumes the difficult and inappropriate task of saying what every religious symbol means. Before studying these cases, I had not known the full history of the menorah, and I suspect the same was true of my colleagues. More important, this history was, and is, likely unknown to the vast majority of people of all faiths who saw the symbol displayed in Pittsburgh. Even if the majority is quite right about the history of the menorah, it hardly follows that this same history informed the observers' view of the symbol and the reason for its presence. This Court is ill equipped to sit as a national theology board, and I question both the wisdom and the constitutionality of its doing so. Indeed, were I required to choose between the approach taken by the majority and a strict separationist view, I would have to respect the consistency of the latter.

The suit before us is admittedly a troubling one. It must be conceded that, however neutral the purpose of the city and county, the eager proselytizer may seek to use these symbols for his own ends. The urge to use them to teach or to taunt is always present. It is also true that some devout adherents of Judaism or Christianity may be as offended by the holiday display as are nonbelievers, if not more so. To place these religious symbols in a common hallway or sidewalk, where they may be ignored or even insulted, must be distasteful to many who cherish their meaning.

For these reasons, I might have voted against installation of these particular displays were I a local legislative official. But we have no jurisdiction over matters of taste within the realm of constitutionally permissible discretion. Our role is enforcement of a written Constitution. In my view, the principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgment of holidays with both cultural and religious aspects. No constitutional violation occurs when they do so by displaying a symbol of the holiday's religious origins.

POWELL *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 88-6801. Decided July 3, 1989

Under Texas law an individual may not be sentenced to death unless the State proves that there is a probability that he would commit future acts of violence that would constitute a continuing threat to society. Following petitioner Powell's arrest for capital murder, a state trial court ordered that a psychiatric examination be conducted to determine his competency to stand trial and sanity at the time of the offenses. Neither he nor his counsel was notified that he would be examined on the issue of future dangerousness, and he was not informed of his right to remain silent. He was convicted. At his sentencing hearing, the doctors who had examined him testified on the issue of future dangerousness, and he was sentenced to death. The Court of Appeals declined to vacate the sentence, holding that, by introducing psychiatric testimony in support of an insanity defense, Powell had waived his Fifth and Sixth Amendment right to object to the State's use of the testimony, *inter alia*, to satisfy its burden of proving future dangerousness.

Held: The evidence of future dangerousness was taken in deprivation of Powell's Sixth Amendment right to the assistance of counsel. Under *Estelle* v. *Smith*, 451 U. S. 454, and *Satterwhite* v. *Texas*, 486 U. S. 249, once a defendant is formally charged, the right to counsel precludes a psychiatric examination concerning future dangerousness without notice to counsel. The lower court's holding that Powell waived his Fifth Amendment privilege against self-incrimination provides no basis for concluding that he waived this separate Sixth Amendment right, and the court erred in conflating the two Amendments' analyses.

Certiorari granted; 767 S. W. 2d 75, reversed.

PER CURIAM.

This case—and, indeed, this precise question—is now before the Court for the second time. Last Term, petitioner sought review of the decision of the Texas Court of Criminal Appeals affirming his sentence of death, asserting that evidence was received during the penalty phase of his trial in contravention of his Fifth and Sixth Amendment rights. After issuing our decision in *Satterwhite* v. *Texas*, 486 U. S.

249 (1988), we granted the petition for a writ of certiorari, vacated the Texas court's judgment, and remanded for further consideration in light of *Satterwhite*. 487 U. S. 1230 (1988). On remand, the Texas court reinstated its prior decision. Because that decision is inconsistent with our decisions in *Satterwhite* and *Estelle* v. *Smith*, 451 U. S. 454 (1981), we now grant the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari and reverse the judgment of the Court of Criminal Appeals.

In *Estelle* v. *Smith* we held that a capital defendant's Fifth Amendment right against compelled self-incrimination precludes the state from subjecting him to a psychiatric examination concerning future dangerousness without first informing the defendant that he has a right to remain silent and that anything he says can be used against him at a sentencing proceeding. *Id.*, at 461–469. We also held—and in this respect the Court's judgment was unanimous—that, once a capital defendant is formally charged, the Sixth Amendment right to counsel precludes such an examination without first notifying counsel that "the psychiatric examination [will] encompass the issue of their client's future dangerousness." *Id.*, at 471. See also *id.*, at 474 (Stewart, J., concurring in judgment); *ibid.* (REHNQUIST, J., concurring in judgment). Last Term's decision in *Satterwhite* reaffirmed this Sixth Amendment protection, emphasizing that "for a defendant charged with a capital crime, the decision whether to submit to a psychiatric examination designed to determine his future dangerousness is 'literally a life or death matter' which the defendant should not be required to face without 'the guiding hand of counsel.'" 486 U. S., at 254 (citations omitted).

In this case there is no dispute that on the day of petitioner's arrest the trial court, at the State's request, ordered that a psychiatric examination be conducted by Dr. Richard Coons and a psychologist of Dr. Coons' choice to determine petitioner's competency to stand trial and sanity at the time of the offense. Dr. Coons examined petitioner on four occasions,

and Dr. George Parker, a clinical psychologist, tested petitioner on two additional occasions. It is also undisputed that neither petitioner nor his attorney was notified that he would be examined on the issue of future dangerousness and that petitioner was not informed of his right to remain silent. Finally, it is uncontested that, over petitioner's objection, Drs. Coons and Parker testified at petitioner's sentencing hearing that based on these examinations they were of the view that petitioner "would commit future acts of violence that would constitute a continuing threat to society." 742 S. W. 2d 353, 356 (Tex. Crim. App. 1987) (en banc). The jury was persuaded of this fact, and petitioner was sentenced to death.[1]

Despite the close similarity between the facts of this case and those at issue in *Smith*, the Texas Court of Criminal Appeals in its original decision declined to vacate petitioner's sentence. 742 S. W. 2d, at 360. That decision was premised on alternative holdings: petitioner's Fifth and Sixth Amendment rights were not violated, *id.*, at 357–359, and, even if they were, any error was harmless, *id.*, at 359–360. After we granted the initial petition for a writ of certiorari, vacated the Court of Criminal Appeals' judgment, and remanded for further consideration in light of *Satterwhite*, the court reinstated its earlier decision holding that petitioner's Fifth and Sixth Amendment rights were not violated. 767 S. W. 2d 759 (1989) (en banc). The court simply withdrew that portion of its original opinion that relied on harmless-error analysis, observing that the analysis it applied was "denounced" in *Satterwhite* and was, in any event, "superfluous to the disposition and constituted nothing more than obiter dictum." 767 S. W. 2d, at 762. But, it made clear that its "initial determination of no *Smith* error, as well as the re-

[1] Under Texas law, a capital defendant may not be sentenced to death unless the State proves beyond a reasonable doubt that "there is a probability that the defendant [will] commit criminal acts of violence that [will] constitute a continuing threat to society." Tex. Code Crim. Proc. Ann., Art. 37.071(b)(2) (Vernon Supp. 1989).

maining holdings of [the] original opinion, . . . remain[ed] undisturbed." *Ibid.* In dissent, Judge Clinton wrote that to consider "that *Satterwhite* 'solely concerned harmless error,' . . . is to disregard much in Part II of that opinion finding a violation of the Sixth Amendment right to assistance of counsel." *Id.*, at 763. He also observed that "it is most unlikely that the Supreme Court would remand this cause for us to reconsider a superfluous harmless error analysis, albeit it was utterly flawed[,] [u]nless the Supreme Court believed 'there was error in admitting the testimony of Drs. Coon[s] and Parker.'" *Id.*, at 764 (citation omitted).

The Court of Criminal Appeals' holding that petitioner's Fifth and Sixth Amendment rights were not violated was based on its conclusion that petitioner waived those rights by introducing psychiatric testimony in support of a defense of insanity. 742 S. W. 2d, at 357–358. The court held that petitioner not only waived the right to object to the State's use of the Coons and Parker testimony to rebut his defense, but that he also waived the right to object to the State's use of this testimony to satisfy its burden at sentencing of proving the separate issue of future dangerousness. *Id.*, at 358–359. Because the Court of Criminal Appeals conflated the Fifth and Sixth Amendment analyses, and provided no support for its conclusion that petitioner waived his Sixth Amendment right, its judgment must be reversed.[2]

The principal support found in the Court of Criminal Appeals' decision for the proposition that petitioner waived the right to object to the State's use of the Coons and Parker testimony is the Fifth Circuit's opinion in *Battie* v. *Estelle*, 655 F. 2d 692 (1981). In that case, the Court of Appeals suggested that if a defendant introduces psychiatric testimony to establish a mental-status defense, the government may be justified in also using such testimony to rebut the defense

[2] We therefore have no occasion to address whether a waiver of the right to object to the use of psychiatric testimony at the guilt phase of a capital trial extends to the sentencing phase as well.

notwithstanding the defendant's assertion that the psychiatric examination was conducted in violation of his right against self-incrimination. *Id.*, at 700–702. In such circumstances, the defendant's use of psychiatric testimony might constitute a waiver of the Fifth Amendment privilege, just as the privilege would be waived if the defendant himself took the stand. *Id.*, at 701–702, and n. 22. The Court of Appeals explained that "any burden imposed on the defense by this result is justified by the State's overwhelming difficulty in responding to the defense psychiatric testimony without its own psychiatric examination of the accused and by the need to prevent fraudulent mental defenses." *Id.*, at 702 (footnote omitted).

Language contained in *Smith* and in our later decision in *Buchanan* v. *Kentucky*, 483 U. S. 402 (1987), provides some support for the Fifth Circuit's discussion of waiver. In *Smith* we observed that "[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he has interjected into the case." 451 U. S., at 465. And in *Buchanan* the Court held that if a defendant requests a psychiatric examination in order to prove a mental-status defense, he waives the right to raise a Fifth Amendment challenge to the prosecution's use of evidence obtained through that examination to rebut the defense. 483 U. S., at 422–423.

Significantly, the Court of Appeals made clear in *Battie* that it was dealing exclusively with the Fifth Amendment privilege and was not passing upon the defendant's separate Sixth Amendment challenge. 655 F. 2d, at 694, n. 2. Likewise, the waiver discussions contained in *Smith* and *Buchanan* deal solely with the Fifth Amendment right against self-incrimination. Indeed, both decisions separately discuss the Fifth and Sixth Amendment issues so as not to confuse the distinct analyses that apply. No mention of waiver is contained in the portion of either opinion discussing the Sixth

Amendment right. This is for good reason. While it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony, it certainly is not unfair to require the state to provide counsel with notice before examining the defendant concerning future dangerousness. Thus, if a defendant were to surprise the prosecution on the eve of trial by raising an insanity defense to be supported by psychiatric testimony, the court might be justified in ordering a continuance and directing that the defendant submit to examination by a state-appointed psychiatrist. There would be no justification, however, for also directing that defense counsel receive no notice of this examination.

The distinction between the appropriate Fifth and Sixth Amendment analyses was recognized in the *Buchanan* decision. In that case, the Court held that the defendant waived his Fifth Amendment privilege by raising a mental-status defense. 483 U. S., at 421–424. This conclusion, however, did not suffice to resolve the defendant's separate Sixth Amendment claim. Thus, in a separate section of the opinion the Court went on to address the Sixth Amendment issue, concluding that on the facts of that case counsel knew what the scope of the examination would be before it took place. *Id.*, at 424–425. Indeed, defense counsel himself requested the psychiatric examination at issue in *Buchanan*. *Id.*, at 424. In contrast, in this case counsel did not know that the Coons and Parker examinations would involve the issue of future dangerousness.[3]

[3] Unlike in *Buchanan*, our decision in *Smith* did not place petitioner's attorney on notice concerning the scope or intended use of the psychiatric examinations. Most significantly, although the Texas Court of Criminal Appeals only recently rendered a decision on his direct appeal, petitioner was tried and convicted before *Smith* was decided. Moreover, even if counsel had anticipated the *Smith* decision, he would only have been on notice that by raising a mental-status defense he might open the door to "use of psychological evidence by the prosecution in rebuttal." *Buchanan*, 483 U. S., at 425 (footnote omitted). Nothing in *Smith*, or any other decision

In deciding that petitioner waived his right to object to the Coons and Parker testimony, the Court of Criminal Appeals in its initial opinion concentrated almost exclusively on petitioner's Fifth Amendment claim to the exclusion of his separate contention that counsel should have been informed that he was to be examined on the issue of future dangerousness. Moreover, even after we remanded for further consideration in light of *Satterwhite*, a case that was premised exclusively on the Sixth Amendment, the court failed to give any further attention to the Sixth Amendment claim. Because the evidence of future dangerousness was taken in deprivation of petitioner's right to the assistance of counsel, and because there is no basis for concluding that petitioner waived his Sixth Amendment right, we now hold that *Smith* and *Satterwhite* control and, accordingly, reverse the judgment of the Court of Criminal Appeals.

It is so ordered.

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of this Court, suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity defense at the guilt stage of trial.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 686 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 23 THROUGH SEPTEMBER 28, 1989

JUNE 23, 1989

Dismissal Under Rule 53

No. 88–1754. O'CONNELL & KITTRELL *v.* KINGERY ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 862 F. 2d 873.

JUNE 26, 1989

Appeal Dismissed. (See No. 88–5986, *infra.*)

Certiorari Granted—Vacated and Remanded

No. 87–1293. BHANDARI *v.* FIRST NATIONAL BANK OF COMMERCE. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Patterson* v. *McLean Credit Union*, 491 U. S. 164 (1989). Reported below: 829 F. 2d 1343.

No. 87–1631. BURLINGTON NORTHERN RAILROAD CO. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS. C. A. 9th Cir. Motion of Equal Employment Advisory Council for leave to file a brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602 (1989). Reported below: 838 F. 2d 1087.

No. 87–2049. RAILWAY LABOR EXECUTIVES' ASSN. ET AL. *v.* CHICAGO & NORTH WESTERN TRANSPORTATION CO. ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pittsburgh & Lake Erie R. Co.* v. *Railway Labor Executives' Assn.*, 491 U. S. 490 (1989). Reported below: 848 F. 2d 102.

No. 88–517. CITY OF GALVESTON, TEXAS, ACTING BY AND THROUGH THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES, ET AL. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pittsburgh &*

Lake Erie R. Co. v. *Railway Labor Executives' Assn.*, 491 U. S. 490 (1989). Reported below: 849 F. 2d 145.

No. 88–955. COMMISSIONER OF INTERNAL REVENUE *v.* MERIT LIFE INSURANCE CO. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Colonial American Life Ins. Co.* v. *Commissioner*, 491 U. S. 244 (1989). Reported below: 853 F. 2d 1435.

No. 88–1063. TENNESSEE *v.* TURNER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Alabama* v. *Smith*, 490 U. S. 794 (1989). Reported below: 858 F. 2d 1201.

No. 88–1282. BROWN-FORMAN CORP. *v.* TENNESSEE ALCOHOLIC BEVERAGE COMMISSION ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Healy* v. *The Beer Institute*, 491 U. S. 324 (1989). Reported below: 860 F. 2d 1354.

No. 88–1486. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY ET AL. *v.* TRANSPORT WORKERS' UNION OF PHILADELPHIA, LOCAL 234, ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Consolidated Rail Corporation* v. *Railway Labor Executives' Assn.*, 491 U. S. 299 (1989). Reported below: 863 F. 2d 1110.

No. 88–1493. SOBOL, COMMISSIONER, NEW YORK STATE DEPARTMENT OF EDUCATION *v.* BURR, BY HIS PARENTS AND NEXT FRIENDS, BURR ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Dellmuth* v. *Muth*, 491 U. S. 223 (1989). Reported below: 863 F. 2d 1071.

No. 88–1653. UNITED TRANSPORTATION UNION *v.* SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602 (1989). Reported below: 863 F. 2d 1110.

No. 88–1706. CHICAGO & NORTH WESTERN TRANSPORTATION CO. ET AL. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL.; and

No. 88–1874. RAILWAY LABOR EXECUTIVES' ASSN. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Pittsburgh & Lake Erie R. Co.* v. *Railway Labor Executives' Assn.*, 491 U. S. 490 (1989). Reported below: 861 F. 2d 1082.

No. 88–7033. HOLLAND *v.* BLAND ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hardin* v. *Straub*, 490 U. S. 536 (1989). Reported below: 865 F. 2d 1268.

Miscellaneous Orders

No. – – ——. SEITU *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. D–749. IN RE DISBARMENT OF CARTER. Disbarment entered. [For earlier order herein, see 488 U. S. 1000.]

No. D–760. IN RE DISBARMENT OF WALLIS. Disbarment entered. [For earlier order herein, see 488 U. S. 1038.]

No. D–761. IN RE DISBARMENT OF GRAHAM. Disbarment entered. [For earlier order herein, see 488 U. S. 1038.]

No. D–767. IN RE DISBARMENT OF ESTON. Disbarment entered. [For earlier order herein, see 489 U. S. 1004.]

No. D–768. IN RE DISBARMENT OF SANDERS. Disbarment entered. [For earlier order herein, see 489 U. S. 1004.]

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. First Interim Report of the Special Master received and ordered filed. [For earlier order herein, see, *e. g.*, 490 U. S. 1063.]

No. 88–854. SPALLONE *v.* UNITED STATES ET AL.;
No. 88–856. CHEMA *v.* UNITED STATES ET AL.; and
No. 88–870. LONGO ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. [Certiorari granted, 489 U. S. 1064.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 88–1000. NEW YORK *v.* HARRIS. Ct. App. N. Y. [Certiorari granted, 490 U. S. 1018.] Motion of Americans for Effec-

tive Law Enforcement, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 88–1449. KOREAN AIR LINES *v.* MACNAMARA; and

No. 88–1551. MACNAMARA *v.* KOREAN AIR LINES. C. A. 3d Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 88–7139. STUTZMAN *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. App. Ct. Ill., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 17, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–7371. IN RE GREEN. Petition for writ of habeas corpus denied.

No. 88–1862. IN RE FLEMING;

No. 88–7143. IN RE SUN; and

No. 88–7153. IN RE REIDT. Petitions for writs of mandamus denied.

No. 88–7157. IN RE MARTIN. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 88–5986. OSBORNE *v.* OHIO. Appeal from Sup. Ct. Ohio. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted limited to Questions I.(b), I.(d), and II presented by the statement as to jurisdiction. With respect to the additional questions presented, appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 37 Ohio St. 3d 249, 525 N. E. 2d 1363.

Certiorari Granted

No. 88–1105. GUIDRY *v.* SHEET METAL WORKERS NATIONAL PENSION FUND ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 856 F. 2d 1457.

No. 88–1685. NATIONAL LABOR RELATIONS BOARD *v.* CURTIN MATHESON SCIENTIFIC, INC. C. A. 5th Cir. Certiorari granted. Reported below: 859 F. 2d 362.

No. 87–2066. W. S. KIRKPATRICK & CO., INC., ET AL. *v.* ENVIRONMENTAL TECTONICS CORP., INTERNATIONAL. C. A. 3d Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 847 F. 2d 1052.

Certiorari Denied. (See also No. 88–5986, *supra.*)

No. 87–1911. RAILWAY LABOR EXECUTIVES' ASSN. ET AL. *v.* GUILFORD TRANSPORTATION INDUSTRIES, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 843 F. 2d 1383.

No. 87–1932. PENNSYLVANIA ELECTRIC CO. *v.* GUNBY. C. A. 3d Cir. Certiorari denied. Reported below: 840 F. 2d 1108.

No. 88–597. CITY OF GRETNA, LOUISIANA, ET AL. *v.* CITIZENS FOR A BETTER GRETNA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 834 F. 2d 496.

No. 88–606. CITY OF BAYTOWN, TEXAS, ET AL. *v.* CAMPOS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 840 F. 2d 1240.

No. 88–664. DIAMOND *v.* CHARLES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 846 F. 2d 1057.

No. 88–1114. LEBMAN ET AL. *v.* AKTIEBOLAGET ELECTROLUX ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 854 F. 2d 1319.

No. 88–1116. ALTON & SOUTHERN LODGE NO. 306, BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA *v.* ALTON & SOUTHERN RAILWAY CO. C. A. 8th Cir. Certiorari denied. Reported below: 849 F. 2d 1111.

No. 88–1243. COMPANY X *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 857 F. 2d 710.

No. 88–1432. ESPARZA ET AL. *v.* VALDEZ, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF LABOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 862 F. 2d 788.

No. 88–1439. MONTGOMERY ET AL. *v.* AURIEMMA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 860 F. 2d 273.

No. 88–1545. LAURINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 529.

No. 88–1566. CITY OF LITTLE ROCK *v.* WILLIAMS. C. A. 8th Cir. Certiorari denied. Reported below: 863 F. 2d 1398.

No. 88–1620. PETRUS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 862 F. 2d 873.

No. 88–1621. GAMBINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 864 F. 2d 1064.

No. 88–1638. PG PUBLISHING CO., T/A THE PITTSBURGH POST-GAZETTE *v.* DISALLE ET UX. Super. Ct. Pa. Certiorari denied. Reported below: 375 Pa. Super. 510, 544 A. 2d 1345.

No. 88–1659. KANNE ET UX. *v.* CONNECTICUT GENERAL LIFE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 867 F. 2d 489.

No. 88–1664. DINORSCIO *v.* UNITED STATES; and
No. 88–6875. COHEN ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 864 F. 2d 271.

No. 88–1684. HENDERSON *v.* L. G. BALFOUR CO. C. A. 5th Cir. Certiorari denied. Reported below: 852 F. 2d 818.

No. 88–1745. COWHIG *v.* MARSH, SECRETARY OF THE ARMY. C. A. 1st Cir. Certiorari denied.

No. 88–1761. SMITH *v.* VAN DUYN. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 173 Ill. App. 3d 523, 527 N. E. 2d 1005.

No. 88–1765. PIZARRO *v.* PLATT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 870 F. 2d 651.

No. 88–1767. SAVE YONKERS FEDERATION, INC., ET AL. *v.* SAND, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 872 F. 2d 1021.

No. 88–1777. POSEY ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 40 Ohio St. 3d 420, 534 N. E. 2d 61.

No. 88–1778. WHATLEY *v.* SKAGGS COS., INC. C. A. 10th Cir. Certiorari denied.

No. 88–1782. BROWN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 28 M. J. 232.

No. 88–1784. GREAT REPUBLIC INSURANCE CO. ET AL. *v.* CHEVAL, BY AND THROUGH HER CONSERVATOR, MILLER. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–1787. HALL *v.* OKABAYASHI ET AL. Int. Ct. App. Haw. Certiorari denied. Reported below: 7 Haw. App. 659, 807 P. 2d 48.

No. 88–1788. DANNER *v.* KLOSTERBUER, ASSISTANT JOHNSON COUNTY ATTORNEY. Ct. App. Iowa. Certiorari denied. Reported below: 434 N. W. 2d 921.

No. 88–1790. NEMOURS FOUNDATION ET AL. *v.* PIERCE ASSOCIATES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 530.

No. 88–1791. VAUGHN ET VIR *v.* SPEAKER ET AL., CO-EXECUTORS OF THE ESTATE OF SPEAKER. Sup. Ct. Ill. Certiorari denied. Reported below: 126 Ill. 2d 150, 533 N. E. 2d 885.

No. 88–1792. CONLEY *v.* BURLINGTON NORTHERN RAILROAD CO. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 765 S. W. 2d 272.

No. 88–1793. ALLARD, AS NATURAL TUTRIX OF THE MINORS, ALLARD ET AL. *v.* BIBEAU ET AL. Sup. Ct. La. Certiorari denied. Reported below: 533 So. 2d 346.

No. 88–1803. GLENDENING *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 536 So. 2d 212.

No. 88–1804. CBS INC. *v.* SILVERMAN. C. A. 2d Cir. Certiorari denied. Reported below: 870 F. 2d 40.

No. 88–1815. NAPIERALSKI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 869 F. 2d 414.

No. 88–1818. DROGOWSKI *v.* PENNSYLVANIA DEPARTMENT OF TRANSPORTATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 2d 588.

No. 88–1829. CRUSE *v.* FAYETTE COUNTY ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: —— Ga. ——, 377 S. E. 2d 680.

No. 88–1879. BAKER ET UX. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 2d 1432.

No. 88–1903. GOLDBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 88–1907. RATCLIFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 867 F. 2d 1426.

No. 88–1908. COVATTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 2d 592.

No. 88–1911. COSENTINO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 869 F. 2d 301.

No. 88–1925. FOSTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 867 F. 2d 838.

No. 88–1935. WALSH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 88–5830. ADAMS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 169 Ill. App. 3d 312, 523 N. E. 2d 223.

No. 88–6623. ESTEVEZ, AKA FONTE-FERRO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 860 F. 2d 706.

No. 88–6777. BRYSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 88–6820. HUGHES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 72 N. Y. 2d 1035, 531 N. E. 2d 652.

No. 88–6884. MARLOW *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 538 So. 2d 804.

No. 88–6941. GREESON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 1492.

No. 88–6944. BAILEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–6957. LIGHTSEY *v.* YEAGER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–6966. RITA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 835 F. 2d 1430.

No. 88–6967. COLLINS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 865 F. 2d 269.

No. 88–6983. JOHNSON, AKA UNION *v.* UNITED STATES; and
No. 88–7001. BANNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 862 F. 2d 1135.

No. 88–6997. LAWSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–6999. PERCHEITTE *v.* UNITED STATES; and
No. 88–7233. CHIPPAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 869 F. 2d 372.

No. 88–7021. HUSAR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 273 U. S. App. D. C. 347, 859 F. 2d 1494.

No. 88–7055. JOHNSON *v.* GOVERNMENT EMPLOYEES INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied.

No. 88–7107. O'NEAL *v.* EU ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 866 F. 2d 314.

No. 88–7111. BYNUM *v.* WOOD. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 536 So. 2d 246.

No. 88–7114. MADSEN *v.* MORRELL ET AL. Sup. Ct. Idaho. Certiorari denied.

No. 88–7116. HART *v.* FRAME ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 870 F. 2d 654.

No. 88–7123. YOUNG *v.* COUGHLIN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 866 F. 2d 567.

No. 88–7126. BILAL *v.* SARGENT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 871 F. 2d 1092.

No. 88–7128. CARTER *v.* OHIO. Ct. App. Ohio, Paulding County. Certiorari denied.

No. 88–7129. HARRISON *v.* BONNER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 862 F. 2d 872.

No. 88–7131. LECHIARA *v.* GASKINS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 866 F. 2d 1416.

No. 88–7134. TEMPLETON *v.* NIX, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 1448.

No. 88–7148. MARTIN *v.* ABRAM D. MELLINGER REAL ESTATE, INC. Super. Ct. Pa. Certiorari denied. Reported below: 380 Pa. Super. 657, 547 A. 2d 444.

No. 88–7149. SPEARS *v.* BULLOCK, SUPERINTENDENT, SAMPSON CORRECTIONAL CENTER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 869 F. 2d 594.

No. 88–7152. HARRIS *v.* HEINRICH ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 872 F. 2d 434.

No. 88–7156. SCOTT *v.* PRINCE GEORGE'S COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 76 Md. App. 357, 545 A. 2d 81.

No. 88–7186. DIXON *v.* KOHL'S FOOD STORES, INC. Ct. App. Wis. Certiorari denied.

No. 88–7225. BAELI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 872 F. 2d 414.

No. 88–7240. BRANHAM *v.* GRINAGE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1488.

No. 88–7253. MEANS ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 858 F. 2d 404.

No. 88–7288. HALLIBURTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 870 F. 2d 557.

No. 88–7293. BURKHART *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–7295. PEREZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 871 F. 2d 45.

No. 88–7313. CASTRO-POUPART *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 872 F. 2d 1073.

No. 88–7315. BRITT, AKA KLEIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 2d 299.

No. 88–7330. HAGEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 277.

No. 88–7345. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 431.

No. 88–603. ARIZONA *v.* FLINT. Ct. App. Ariz. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 157 Ariz. 227, 756 P. 2d 324.

No. 88–1796. ILLINOIS *v.* VOUGHT. App. Ct. Ill., 2d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 174 Ill. App. 3d 563, 528 N. E. 2d 1095.

No. 88–1648. NORFOLK SHIPBUILDING & DRYDOCK CORP. *v.* NANCE ET AL. C. A. 4th Cir. Motion of the parties to remand denied. Certiorari denied. Reported below: 858 F. 2d 182.

No. 88–1675. MORAN *v.* PERRY ET AL. Sup. Ct. Wash. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 111 Wash. 2d 885, 766 P. 2d 1096.

No. 88–1751. NORTHWEST FOREST RESOURCE COUNCIL *v.* PORTLAND AUDUBON SOCIETY ET AL. C. A. 9th Cir. Motion of Mountain States Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 866 F. 2d 302.

No. 88–6897. WESTLEY *v.* TEXAS. Ct. Crim. App. Tex.; and No. 88–7090. BENNETT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 88–6897, 754 S. W. 2d 224; No. 88–7090, 766 S. W. 2d 227.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88-6965 (A-798). WASHINGTON *v.* TEXAS;
No. 88-7010 (A-820). TUCKER *v.* TEXAS; and
No. 88-7062 (A-982). BEETS *v.* TEXAS. Ct. Crim. App. Tex. Applications for stays of mandates, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: No. 88-6965, 771 S. W. 2d 537; No. 88-7010, 771 S. W. 2d 523; No. 88-7062, 767 S. W. 2d 711.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88-7161. HERRING *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 210 Conn. 78, 554 A. 2d 686.

Rehearing Denied

No. 87-1594. CROMAN *v.* MANHATTAN COMMUNITY COLLEGE, 490 U. S. 1064;
No. 88-1419. LAFFERTY *v.* ALYESKA PIPELINE SERVICE CO. ET AL., 490 U. S. 1021;
No. 88-1519. BERGMAN *v.* UNITED STATES, 490 U. S. 1036;
No. 88-1641. BODINE *v.* UNITED STATES, 490 U. S. 1048;
No. 88-6513. ATHERTON *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL., 490 U. S. 1048;
No. 88-6739. SUTTON *v.* UNITED STATES, 490 U. S. 1011;
No. 88-6813. KIM *v.* UNITED STATES ET AL., 490 U. S. 1070;
No. 88-6827. IN RE WALKER, 490 U. S. 1045;
No. 88-6846. SUMMERS *v.* CHAVIS, WARDEN, ET AL., 490 U. S. 1071;
No. 88-6900. HOFFMAN *v.* UNITED STATES, 490 U. S. 1051;
No. 88-6904. MCDONALD *v.* YELLOW CAB METRO, INC., 490 U. S. 1083; and
No. 88-6994. WILLIAMS *v.* LITTLE FLOWER CHILDRENS SERVICES, 490 U. S. 1093. Petitions for rehearing denied.

No. 88-6293. ROBINSON *v.* UNITED STATES ET AL., 489 U. S. 1068; and

No. 88-6659. READ *v.* TAYLOR ET AL., 490 U. S. 1025. Motions for leave to file petitions for rehearing denied.

JULY 3, 1989

Appeal Dismissed

No. 88-1819. MCCORDIC *v.* CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 87-1051. HOBSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, *ante*, p. 229. Reported below: 825 F. 2d 364.

No. 87-1358. MARSHALL-SILVER CONSTRUCTION CO., INC., ET AL. *v.* MENDEL ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, *ante*, p. 229. THE CHIEF JUSTICE, JUSTICE WHITE, JUSTICE STEVENS, and JUSTICE O'CONNOR would deny certiorari. Reported below: 835 F. 2d 63.

No. 87-1530. EASTERN PUBLISHING & ADVERTISING, INC., T/A ARMED FORCES NEWS *v.* CHESAPEAKE PUBLISHING & ADVERTISING, INC., T/A THE MILITARY NEWS, ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, *ante*, p. 229. THE CHIEF JUSTICE, JUSTICE WHITE, JUSTICE STEVENS, and JUSTICE O'CONNOR would deny certiorari. Reported below: 831 F. 2d 488.

No. 87-1742. TERRE DU LAC ASSN., INC. *v.* TERRE DU LAC, INC., ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, *ante*, p. 229. Reported below: 834 F. 2d 148.

No. 87-1760. PERKINSON ET VIR, T/A PERKINSON & PERKINSON *v.* HUFFMAN, TRUSTEE FOR HARBOUR, DEBTOR, ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case

remanded for further consideration in light of *Granfinanciera, S. A.* v. *Nordberg*, *ante*, p. 33. Reported below: 840 F. 2d 1165.

No. 87–6482. RICHARDSON *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Penry* v. *Lynaugh*, *ante*, p. 302. Reported below: 744 S. W. 2d 65.

No. 87–6820. WAGNER *v.* OREGON. Sup. Ct. Ore. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Penry* v. *Lynaugh*, *ante*, p. 302. Reported below: 305 Ore. 115, 752 P. 2d 1136.

No. 88–190. DRIVERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 639, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL–CIO, ET AL. *v.* YELLOW BUS LINES, INC. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, *ante*, p. 229. JUSTICE STEVENS would deny certiorari. Reported below: 268 U. S. App. D. C. 103, 839 F. 2d 782.

No. 88–558. WALK ET AL. *v.* BALTIMORE & OHIO RAILROAD ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, *ante*, p. 229. Reported below: 847 F. 2d 1100.

No. 88–1506. FRYAR *v.* ABELL ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, *ante*, p. 229. Reported below: 858 F. 2d 1104.

No. 88–1523. HELMSLEY ET AL. *v.* BEAUFORD ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, *ante*, p. 229. Reported below: 865 F. 2d 1386.

No. 88–1534. MERCY-MEMORIAL HOSPITAL CORP. ET AL. *v.* HOSPITAL EMPLOYEES' DIVISION OF LOCAL 79, SERVICE EMPLOY-

EES INTERNATIONAL UNION, AFL–CIO, ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, *ante*, p. 229. Reported below: 862 F. 2d 606.

No. 88–5611. ALEXANDER *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, *ante*, p. 229. JUSTICE STEVENS would deny certiorari. Reported below: 850 F. 2d 1500.

No. 88–5792. GRAHAM *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Penry* v. *Lynaugh*, *ante*, p. 302. Reported below: 854 F. 2d 715.

No. 88–7199. BOGGESS *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Penry* v. *Lynaugh*, *ante*, p. 302.

Certiorari Granted—Reversed. (See No. 88–6801, *ante*, p. 680.)

Miscellaneous Orders

No. — — ——. ROBINSON *v.* PUCKETT. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. D–788. IN RE DISBARMENT OF CATES. Disbarment entered. [For earlier order herein, see 490 U. S. 1062.]

No. 65, Orig. TEXAS *v.* NEW MEXICO. Final Report of the Pecos River Master for Accounting Year 1989 received and ordered filed. [For earlier order herein, see, *e. g.*, 490 U. S. 1044.]

No. 88–192. MCKESSON CORP. *v.* DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION OF FLORIDA, ET AL. Sup. Ct. Fla. [Certiorari granted, 488 U. S. 954]; and

No. 88–325. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL. Sup. Ct. Ark. [Certiorari granted, 488

U. S. 954.] Cases restored to calendar for reargument. In No. 88–192, the parties are directed to brief and argue the following questions in addition to the issues already briefed:

"1. When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause, must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?

"2. May a State, consistent with the Due Process Clause of the 14th Amendment, remedy the effects of a tax found to discriminate against an interstate business in violation of the Dormant Commerce Clause by retroactively raising the taxes of those who benefited from the discrimination?"

Each case is allotted 45 minutes for reargument.

No. 88–1805. EASTERN NEBRASKA COMMUNITY OFFICE OF RETARDATION ET AL. *v.* GLOVER ET AL. C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 88–6896. SCHAEFER *v.* TRANSPORTATION MEDIA, INC. C. A. 7th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [490 U. S. 1063] denied.

No. 88–6995. MOORE *v.* CALIFORNIA, 490 U. S. 1095. Respondent is requested to file a response to the petition for rehearing within 30 days.

No. 88–1990. IN RE LAROUCHE ET AL.;
No. 88–7408. IN RE QUALMAN ET UX.; and
No. 88–7413. IN RE SNYDER. Petitions for writs of habeas corpus denied.

No. 88–1329. IN RE DELGADO ET AL. Petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 88–805. OHIO *v.* AKRON CENTER FOR REPRODUCTIVE HEALTH ET AL. Appeal from C. A. 6th Cir. Probable jurisdiction noted. Reported below: 854 F. 2d 852.

No. 88–790. TURNOCK, DIRECTOR OF THE ILLINOIS DEPARTMENT OF PUBLIC HEALTH, ET AL. *v.* RAGSDALE ET AL. Appeal

from C. A. 7th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 841 F. 2d 1358.

Certiorari Granted

No. 88–334. LYTLE *v.* HOUSEHOLD MANUFACTURING, INC., DBA SCHWITZER TURBOCHARGERS. C. A. 4th Cir. Certiorari granted. Reported below: 831 F. 2d 1057.

No. 88–1503. CRUZAN, BY HER PARENTS AND CO-GUARDIANS, CRUZAN ET UX. *v.* DIRECTOR, MISSOURI DEPARTMENT OF HEALTH, ET AL. Sup. Ct. Mo. Certiorari granted. Reported below: 760 S. W. 2d 408.

No. 88–1597. BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66) ET AL. *v.* MERGENS, BY AND THROUGH HER NEXT FRIEND, MERGENS, ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 867 F. 2d 1076.

No. 88–1125. HODGSON ET AL. *v.* MINNESOTA ET AL.; and
No. 88–1309. MINNESOTA ET AL. *v.* HODGSON ET AL. C. A. 8th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 853 F. 2d 1452.

No. 88–1775. PEEL *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS. Sup. Ct. Ill. Motions of National Board of Trial Advocacy and Association of Trial Lawyers of America et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 126 Ill. 2d 397, 534 N. E. 2d 980.

No. 88–7146. WHITMORE, INDIVIDUALLY AND AS NEXT FRIEND OF SIMMONS *v.* ARKANSAS ET AL. Sup. Ct. Ark. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 298 Ark. 193 and 255, 766 S. W. 2d 422 and 423.

Certiorari Denied. (See also No. 88–1819, *supra.*)

No. 87–1262. ROGERS ET AL. *v.* LIQUID AIR CORP. C. A. 7th Cir. Certiorari denied. Reported below: 834 F. 2d 1297.

No. 87–1478. MEDALLION TELEVISION ENTERPRISES, INC., ET AL. *v.* SELECTV OF CALIFORNIA, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 1360.

No. 87–1738. CREATIVE BATH PRODUCTS, INC., ET AL. *v.* CONNECTICUT GENERAL LIFE INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 837 F. 2d 561.

No. 87–1854. CORY *v.* STANDARD FEDERAL SAVINGS & LOAN ASSN. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 843 F. 2d 1386.

No. 88–458. SK HAND TOOL CORP. ET AL. *v.* DRESSER INDUSTRIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 852 F. 2d 936.

No. 88–625. METROMEDIA, INC., ET AL. *v.* APRIL ENTERPRISES, INC. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88–903. AMERICANA HOTELS, INC., ET AL. *v.* PARNAR. Sup. Ct. Haw. Certiorari denied. Reported below: 70 Haw. 649, 796 P. 2d 997.

No. 88–1327. DELGADO ET AL. *v.* SMITH, SECRETARY OF STATE OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 2d 1489.

No. 88–1518. ABELL ET AL. *v.* WRIGHT, LINDSEY & JENNINGS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 858 F. 2d 1104.

No. 88–1547. CALIFORNIA *v.* BAERT. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 205 Cal. App. 3d 514, 252 Cal. Rptr. 418.

No. 88–1611. GAHAGAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 1490.

No. 88–1623. DELIERE *v.* UNITED STATES;
No. 88–6952. DOHERTY *v.* UNITED STATES;
No. 88–6953. BARNER *v.* UNITED STATES; and
No. 88–7249. SALERNO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 867 F. 2d 47.

No. 88–1660. MARINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 868 F. 2d 549.

No. 88–1701. WILSON ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 864 F. 2d 1219.

No. 88–1781. ALGOMA STEEL CORP., LTD. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 865 F. 2d 240.

No. 88–1785. LAMPASONA *v.* JACOBS. Sup. Ct. Conn. Certiorari denied. Reported below: 209 Conn. 724, 553 A. 2d 175.

No. 88–1786. TWIN MANORS WEST OF MORTON GROVE CONDOMINIUM ASSN. *v.* ROSEWELL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 175 Ill. App. 3d 564, 529 N. E. 2d 1104.

No. 88–1798. HEMON *v.* OFFICE OF PUBLIC GUARDIAN ET AL. (two cases). Sup. Ct. N. H. Certiorari denied.

No. 88–1802. CHOW *v.* ATTORNEY GRIEVANCE COMMISSION. Sup. Ct. Mich. Certiorari denied.

No. 88–1807. FLETCHER *v.* O'DONNELL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 867 F. 2d 791.

No. 88–1814. STINNER *v.* STINNER ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 520 Pa. 374, 554 A. 2d 45.

No. 88–1816. CITY OF BURLINGTON, VERMONT *v.* MOUNTAIN CABLE CO. Sup. Ct. Vt. Certiorari denied. Reported below: 151 Vt. 161, 559 A. 2d 153.

No. 88–1820. MEBANE *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 17 Conn. App. 243, 551 A. 2d 1268.

No. 88–1821. MARI *v.* GREEN. Sup. Ct. Wyo. Certiorari denied. Reported below: 767 P. 2d 600.

No. 88–1825. HARRIS ET AL. *v.* UNION ELECTRIC CO. ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 766 S. W. 2d 80.

No. 88–1830. MITCHELL *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied.

No. 88–1833. WILLIAMS *v.* BAPTIST MEDICAL CENTER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1423.

No. 88–1837. SMITH *v.* DOE. Ct. App. Ind. Certiorari denied. Reported below: 530 N. E. 2d 331.

No. 88–1840. VOELLINGER *v.* POLICE RETIREMENT SYSTEM OF ST. LOUIS ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 763 S. W. 2d 298.

No. 88–1841. INDIANA CIVIL RIGHTS COMMISSION ET AL. *v.* AMERICAN COMMERCIAL BARGE LINE CO. Ct. App. Ind. Certiorari denied. Reported below: 523 N. E. 2d 241.

No. 88–1845. NEW JERSEY CHAMBER OF COMMERCE ET AL. *v.* HUGHEY, COMMISSIONER OF ENVIRONMENTAL PROTECTION OF NEW JERSEY, ET AL.; and

No. 88–1868. FRAGRANCE MATERIALS ASSOCIATION OF THE UNITED STATES ET AL. *v.* VAN NOTE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 868 F. 2d 621.

No. 88–1849. WORKERS' COMPENSATION INSURERS RATING ASSOCIATION OF MINNESOTA ET AL. *v.* AUSTIN PRODUCTS CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 867 F. 2d 1552.

No. 88–1851. WHITE, SECRETARY, PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, ET AL. *v.* BENNETT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 1395.

No. 88–1855. HENRY *v.* BEAUMONT IRON & METAL CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 1418.

No. 88–1857. HOWARD *v.* PUNG, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 862 F. 2d 1348.

No. 88–1861. STRYKER ET AL. *v.* DECKER ET UX.; LOUGHLIN *v.* GERSCH; CITY AND COUNTY OF DENVER ET AL. *v.* HIGHTBERRY; and KUKURIS ET AL. *v.* ZAPP ET AL. Ct. App. Colo. Certiorari denied.

No. 88–1882. REYES *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 13 Kan. App. 2d xli, 764 P. 2d 853.

No. 88–1929. WASHABAUGH *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 88–1934. GRACEY *v.* DAY. C. A. 3d Cir. Certiorari denied.

No. 88–1941. SHARIFINASSAB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 870 F. 2d 1047.

No. 88–1949. NAN YA PLASTICS CORP. U. S. A. *v.* DESANTIS. Sup. Ct. Va. Certiorari denied. Reported below: 237 Va. 255, 377 S. E. 2d 388.

No. 88–1967. ANDERSON *v.* SICKELS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 859 F. 2d 149.

No. 88–1975. BARROW *v.* HAWKINS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 2d 1274.

No. 88–5077. DICAPRIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1017.

No. 88–6376. MONTERO *v.* MEYER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 861 F. 2d 603.

No. 88–6627. COSTELLO ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 204 Cal. App. 3d 431, 251 Cal. Rptr. 325.

No. 88–6930. WARRICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 864 F. 2d 789.

No. 88–6947. DIWAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 715.

No. 88–7064. IREDIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 114.

No. 88–7098. HARRIS *v.* JONES. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1490.

No. 88–7110. PANTOJA *v.* STATEVILLE CORRECTIONAL CENTER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 870 F. 2d 659.

No. 88–7165. JOHNSON *v.* KEGANS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 870 F. 2d 992.

No. 88–7169. MASON *v.* REES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 259.

No. 88–7170. MARQUEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88–7172. SMITH *v.* ESTELLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 869 F. 2d 1485.

No. 88–7174. SHEARER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 259 Ga. 51, 376 S. E. 2d 194.

No. 88–7175. JONES *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1422.

No. 88–7176. SANDERS *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Los Angeles County. Certiorari denied.

No. 88–7177. CALPIN *v.* KADISH. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 792.

No. 88–7178. HOFFMAN *v.* KELSEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1490.

No. 88–7179. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 863 F. 2d 889.

No. 88–7182. MIRELES *v.* MCKAY, ATTORNEY GENERAL OF NEVADA. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 2d 1497.

No. 88–7187. MATHEWS *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1026.

No. 88–7192. CHANDLER *v.* WHITE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 1447.

No. 88–7193. MANCHESTER *v.* FLYNN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 870 F. 2d 651.

No. 88–7197. ROBERTS *v.* J. M. HUBER CORP. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1491.

No. 88–7202. CARPENTER ET UX. *v.* WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1257.

No. 88–7203. SHANNON *v.* O'LEARY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 88–7206. COLEMAN ET AL. *v.* BUTLER. Sup. Ct. Ark. Certiorari denied. Reported below: 296 Ark. 447, 757 S. W. 2d 175.

No. 88–7207. CORBIT *v.* DENLEY. Sup. Ct. Ala. Certiorari denied. Reported below: 541 So. 2d 475.

No. 88–7208. PEREZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 536 So. 2d 206.

No. 88–7220. WARREN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 768 S. W. 2d 300.

No. 88–7256. BLAIR *v.* PREECE ET AL. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 180 W. Va. 501, 377 S. E. 2d 493.

No. 88–7273. ADKISSON *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 88–7280. DRESSEL ET AL. *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 244 Kan. 522, 769 P. 2d 1174.

No. 88–7289. WILLIAMSON *v.* BUCKINGHAM ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1030.

No. 88–7296. WYNN *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 88–7317. CRAFT *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1422.

No. 88–7320. IDUWE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 869 F. 2d 1485.

No. 88–7321. JOLLY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 2d 119.

No. 88–7324. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1441.

No. 88–7326. BOSLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 2d 298.

No. 88–7328. FOOTS, AKA HENDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 876 F. 2d 900.

No. 88–7331. WILLIAMS *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 863 F. 2d 46.

No. 88–7335. MCCARTER *v.* UNITED STATES; and
No. 88–7339. SWISHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1079.

No. 88–7336. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 876 F. 2d 900.

No. 88–7342. JUVENILE MALE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 2d 1499.

No. 88–7347. RHODEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 2d 298.

No. 88–7355. HOLLAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 866 F. 2d 1416.

No. 88–7357. EAGLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 1448.

No. 88–7365. HATCH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 88–7369. IRAHETA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 88–7376. MEJIA-OROSCO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 867 F. 2d 216.

No. 88–7380. ESPINOZA-LEON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 743.

No. 88–7387. BOP-NIN CHOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 431.

No. 88–7389. DORSEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 275 U. S. App. D. C. 176, 865 F. 2d 1275.

No. 88–7390. YAMIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 130.

No. 88–7392. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 2d 1274.

No. 88–7396. SNOOK *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 210 Conn. 244, 555 A. 2d 390.

No. 88–7399. PRUITT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1079.

No. 88–7401. PERVEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 871 F. 2d 310.

No. 88–7410. ROJAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 865 F. 2d 1272.

No. 88–7424. PRICE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 872 F. 2d 422.

No. 88–7458. DARWALL, AKA FARMER *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1489.

No. 85–5609. PREJEAN *v.* BLACKBURN, WARDEN. C. A. 5th Cir.;

No. 86–6023. KUNKLE *v.* TEXAS. Ct. Crim. App. Tex.;

No. 87–6406. WILLIAMS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;

No. 88–1154. MONROE *v.* BUTLER, WARDEN. Crim. Dist. Ct. La., Parish of Orleans;

No. 88–5189. CREWS *v.* ILLINOIS. Sup. Ct. Ill.;

No. 88–5237. GUERRA *v.* TEXAS. Ct. Crim. App. Tex.;

No. 88–5437. WILLIAMS *v.* GEORGIA. Sup. Ct. Ga.;

No. 88–5581. POGGI *v.* CALIFORNIA. Sup. Ct. Cal.;

No. 88–5749. HOLLOWAY *v.* OHIO. Sup. Ct. Ohio;

No. 88–5953. MACKALL *v.* VIRGINIA. Sup. Ct. Va.;

No. 88–6315. BELL *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;

No. 88–6585. FETTERLY *v.* IDAHO. Sup. Ct. Idaho;

No. 88–6611. LECROY *v.* FLORIDA. Sup. Ct. Fla.;

No. 88–6838. PERILLO *v.* TEXAS. Ct. Crim. App. Tex.;

No. 88–7013. KELLY *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;

No. 88–7138. GILLARD *v.* OHIO. Sup. Ct. Ohio;

No. 88–7242. STOUT *v.* VIRGINIA. Sup. Ct. Va.; and

No. 88–7394. NGUYEN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: No. 85–5609, 743 F. 2d 1091 and 765 F. 2d 482; No. 86–6023, 771 S. W. 2d 435; No. 87–6406, 837 F. 2d 1294; No. 88–5189, 122 Ill. 2d 266, 522 N. E. 2d 1167; No. 88–5237, 771 S. W. 2d 453; No. 88–5437, 258 Ga. 281, 368 S. E. 2d 742; No. 88–5581, 45 Cal. 3d 306, 753 P. 2d 1082; No. 88–5749, 38 Ohio St. 3d 239, 527 N. E. 2d 831; No. 88–5953, 236 Va. 240, 372 S. E. 2d 759; No. 88–6315, 858 F. 2d 978; No.

88–6585, 115 Idaho 231, 766 P. 2d 701; No. 88–6611, 533 So. 2d 750; No. 88–6838, 758 S. W. 2d 567; No. 88–7013, 862 F. 2d 1126; No. 88–7138, 40 Ohio St. 3d 226, 533 N. E. 2d 272; No. 88–7242, 237 Va. 126, 376 S. E. 2d 288; No. 88–7394, 769 P. 2d 167.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 87–1705. BARRETT *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 837 F. 2d 1341.

No. 87–5666. HIGH *v.* ZANT, WARDEN. C. A. 11th Cir. The order entered June 30, 1988 [487 U. S. 1233], is vacated. Certiorari denied. Reported below: 819 F. 2d 988.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would vacate the death sentence in this case.

No. 88–492. SHOSHONE TRIBE ET AL. *v.* WYOMING ET AL.; and No. 88–553. CITY OF RIVERTON, WYOMING, ET AL. *v.* UNITED STATES ET AL. Sup. Ct. Wyo. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 753 P. 2d 76.

No. 88–626. GOODYEAR TIRE & RUBBER CO. *v.* HODDER. Sup. Ct. Minn. Motion of Motor Vehicle Manufacturers Association of the United States, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 426 N. W. 2d 826.

No. 88–1186. CUDAHY CO. ET AL. *v.* MILLER ET AL. C. A. 10th Cir. Motion of National Association of Manufacturers of the United States of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 858 F. 2d 1449.

No. 88–1824. DEFORD ET AL. *v.* SOO LINE RAILROAD CO. ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 867 F. 2d 1080.

No. 88–1867. FLEMING *v.* MOORE ET AL. Sup. Ct. Va. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied.

No. 88–7026 (A–891). FEARANCE *v.* TEXAS; and

No. 88–7354 (A–932). BOWER *v.* TEXAS. Ct. Crim. App. Tex. Applications for stays of mandates, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: No. 88–7026, 771 S. W. 2d 486; No. 88–7354, 769 S. W. 2d 887.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 88–1463. WRENN *v.* STATE INDUSTRIAL INSURANCE SYSTEM, 490 U. S. 1080;

No. 88–1481. OEN YIN-CHOY *v.* ROBINSON, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF CALIFORNIA, 490 U. S. 1106;

No. 88–1533. TWIST *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, 490 U. S. 1066;

No. 88–1570. WASHINGTON ET UX. *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF LAPORTE COUNTY, INDIANA, ET AL., 490 U. S. 1067;

No. 88–1673. BONELLO *v.* CONNECTICUT, 490 U. S. 1082;

No. 88–5799. BEUKE *v.* OHIO, 489 U. S. 1071;

No. 88–6066. HILDWIN *v.* FLORIDA, 490 U. S. 638;

No. 88–6353. BEDFORD *v.* OHIO, 489 U. S. 1072;

No. 88–6618. FRITZ *v.* BARKER, JUDGE, KENTUCKY CIRCUIT COURT AT FAYETTE, ET AL., 490 U. S. 1070;

No. 88–6641. HERBERT *v.* UNITED STATES, 490 U. S. 1070;

No. 88–6642. ALBANESE *v.* ILLINOIS, 490 U. S. 1075;

No. 88–6737. MCCOLPIN *v.* UNITED STATES, 490 U. S. 1070;

No. 88–6785. FRITZ *v.* BARKER, JUDGE, KENTUCKY CIRCUIT COURT AT FAYETTE, ET AL., 490 U. S. 1070;

No. 88–6804. FOSTER *v.* GEORGIA, 490 U. S. 1085;

No. 88–6810. LEE *v.* GEORGIA, 490 U. S. 1075;

No. 88–6826. IN RE PHILLIPS, 490 U. S. 1064;

No. 88–6886. FILOON *v.* WORKMEN'S COMPENSATION APPEAL BOARD, 490 U. S. 1072;

No. 88–6932. EUBANKS ET UX. *v.* SOUTH CAROLINA NATIONAL BANK ET AL., 490 U. S. 1083;

No. 88–6962. THOMPSON *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL., 490 U. S. 1092;

No. 88–6988. CRAIG *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 490 U. S. 1093;

No. 88–7004. FLANAGAN *v.* UNITED STATES, 490 U. S. 1074;

No. 88–7015. MARTIN *v.* C. ITOH & CO., INC., ET AL., 490 U. S. 1100;

No. 88–7016. IN RE MARTIN, 490 U. S. 1097; and

No. 88–7068. CHIZMADIA *v.* SMILEY'S POINT CLINIC ET AL., 490 U. S. 1084. Petitions for rehearing denied.

No. 88–1178. KEANE *v.* UNITED STATES, 490 U. S. 1084. Petition for rehearing denied. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 88–7052. MARINE *v.* UNITED STATES, 490 U. S. 1075. Motion for leave to file petition for rehearing denied.

JULY 12, 1989

Miscellaneous Order

No. A–1060 (88–7562). KIMBLE *v.* VASQUEZ, WARDEN. Sup. Ct. Cal. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

JULY 13, 1989

Miscellaneous Orders

No. A–29 (89–5094). DUNKINS *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of

death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. A–31. DUNKINS *v.* JONES, WARDEN, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution to permit the filing and consideration of petitions for writs of certiorari. We would grant the petitions and vacate the death sentence.

JULY 18, 1989

Miscellaneous Order

No. A–42 (89–5121). HAMBLEN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

AUGUST 11, 1989

Miscellaneous Orders

No. A–916. BANKERS MULTIPLE LINE INSURANCE CO. *v.* FARISH ET AL. Dist. Ct. App. Fla., 4th Dist. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–917 (88–7626). RIVERA *v.* OROWEAT FOODS CO., INC., ET AL. C. A. 9th Cir. Application for recall and stay of mandate, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–961. UNITED STATES AUTOMOBILE ASSN. *v.* WADE ET AL. Sup. Ct. Ala. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–19. HASTINGS, UNITED STATES DISTRICT JUDGE *v.* UNITED STATES SENATE ET AL. Application for injunction, addressed to JUSTICE BRENNAN and referred to the Court, denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. D–766. IN RE DISBARMENT OF HALPER. Disbarment entered. [For earlier order herein, see 489 U. S. 1004.]

No. D–778. IN RE DISBARMENT OF SHULTZ. Disbarment entered. [For earlier order herein, see 490 U. S. 1017.]

No. D–780. IN RE DISBARMENT OF HAYES. Disbarment entered. [For earlier order herein, see 490 U. S. 1017.]

No. D–781. IN RE DISBARMENT OF BLACK. Disbarment entered. [For earlier order herein, see 490 U. S. 1017.]

No. D–782. IN RE DISBARMENT OF RICKS. Disbarment entered. [For earlier order herein, see 490 U. S. 1044.]

No. D–783. IN RE DISBARMENT OF PAIGE. Disbarment entered. [For earlier order herein, see 490 U. S. 1044.]

No. D–785. IN RE DISBARMENT OF ARONSON. Disbarment entered. [For earlier order herein, see 490 U. S. 1062.]

No. D–786. IN RE DISBARMENT OF FORD. Disbarment entered. [For earlier order herein, see 490 U. S. 1062.]

No. D–790. IN RE DISBARMENT OF FITZGERALD. Disbarment entered. [For earlier order herein, see 490 U. S. 1089.]

No. D–795. IN RE DISBARMENT OF HELD. It is ordered that John J. Held, of Erie, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–796. IN RE DISBARMENT OF CANNON. It is ordered that Glenn Dale Cannon, of Gulfport, Miss., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–797. IN RE DISBARMENT OF RIPES. It is ordered that Lawrence Ripes, of Northbrook, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–798. IN RE DISBARMENT OF ZEALY. It is ordered that Michael Edwin Zealy, of Fort Lauderdale, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–799. IN RE DISBARMENT OF DAVIS. It is ordered that Arvin Lee Davis, of Kalamazoo, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–800. IN RE DISBARMENT OF KLAN. It is ordered that William Francis Xavier Klan, of Danbury, Conn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–801. IN RE DISBARMENT OF JACOBSON. It is ordered that Robert George Jacobson, of Port Charlotte, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–802. IN RE DISBARMENT OF ROLLMAN. It is ordered that Warren E. Rollman, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–803. IN RE DISBARMENT OF DIRICCO. It is ordered that Dennis R. DiRicco, of San Mateo, Cal., be suspended from

the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–804. IN RE DISBARMENT OF MCMANUS. It is ordered that George W. McManus, Jr., of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 87–1614. MARTIN ET AL. *v.* WILKS ET AL., 490 U. S. 755;

No. 87–1639. PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, ET AL. *v.* WILKS ET AL., 490 U. S. 755;

No. 87–1668. ARRINGTON ET AL. *v.* WILKS ET AL., 490 U. S. 755;

No. 87–7107. SLAUGHTER *v.* KENTUCKY, 490 U. S. 1113;

No. 88–420. JONES, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN AT MOBERLY *v.* THOMAS, 491 U. S. 376;

No. 88–774. NEWMAN-GREEN, INC. *v.* ALFONZO-LARRAIN ET AL., 490 U. S. 826;

No. 88–897. ASHENBAUGH ET AL. *v.* CRUCIBLE INC. 1975 SALARIED RETIREMENT PLAN, 490 U. S. 1105;

No. 88–1612. HODGE *v.* KELLY ET AL., 490 U. S. 1081;

No. 88–1616. LOMBARDO *v.* UNITED STATES, 491 U. S. 905;

No. 88–1672. ACOSTA *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, 490 U. S. 1082;

No. 88–1711. PRUESSMAN *v.* LEWIS ET AL., 490 U. S. 1116;

No. 88–1717. FASSLER *v.* UNITED STATES, 490 U. S. 1099;

No. 88–1799. JACKSON *v.* UNITED STATES, 490 U. S. 1099;

No. 88–5241. HOWARD *v.* SOUTH CAROLINA, 490 U. S. 1113;

No. 88–6494. WRENN *v.* BENSON ET AL., 490 U. S. 1069;

No. 88–6723. NIXON *v.* MISSISSIPPI, 490 U. S. 1102;

No. 88–6917. MEADE-MURPHY *v.* CITY OF ATLANTA ET AL., 491 U. S. 907;

No. 88–6959. MENARD *v.* COUNTY OF HENRICO, VIRGINIA, ET AL., 490 U. S. 1110;

No. 88–6992. WILLIAMS *v.* WALLMAN, WARDEN, ET AL., 490 U. S. 1093;

No. 88–7057. RUSCITTI *v.* ESTATE OF RUSCITTI, 490 U. S. 1111;

No. 88–7065. BARNES *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 490 U. S. 1111;

No. 88–7103. MARTIN *v.* COURT OF APPEALS OF MARYLAND ET AL., 491 U. S. 908;

No. 88–7107. O'NEAL *v.* EU ET AL., *ante*, p. 909;

No. 88–7128. CARTER *v.* OHIO, *ante*, p. 909;

No. 88–7148. MARTIN *v.* ABRAM D. MELLINGER REAL ESTATE, INC., *ante*, p. 910;

No. 88–7157. IN RE MARTIN, *ante*, p. 904;

No. 88–7171. MAY *v.* HACKETT, 490 U. S. 1112;

No. 88–7200. IRVING, AKA OWENS *v.* UNITED STATES, 490 U. S. 1113;

No. 88–7240. BRANHAM *v.* GRINAGE ET AL., *ante*, p. 910;

No. 88–7272. STENGEL *v.* UNITED STATES, 491 U. S. 909; and

No. 88–7281. IN RE HUMPHREY, 491 U. S. 903. Petitions for rehearing denied.

No. — - ——. IN RE MASON ET UX., 490 U. S. 1104. Petition for rehearing and for other relief denied.

No. 87–963. HERNANDEZ *v.* COMMISSIONER OF INTERNAL REVENUE, 490 U. S. 680; and

No. 87–1616. GRAHAM ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 490 U. S. 680. Petition for rehearing denied. Motion to remand for further proceedings on unresolved issues denied. JUSTICE BRENNAN and JUSTICE KENNEDY took no part in the consideration or decision of this petition and motion.

No. 87–6405. TOMPKINS *v.* TEXAS, 490 U. S. 754. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 88–1843. ROGGIO *v.* UNITED STATES, 490 U. S. 1109. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

AUGUST 17, 1989

Miscellaneous Order

No. A–139. RICHARDSON *v.* ALABAMA. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

Certiorari Denied

No. 89–5395 (A–142). RICHARDSON *v.* THIGPEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 883 F. 2d 895.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

AUGUST 18, 1989

Miscellaneous Order

No. A–126. SOUTHERN UNIVERSITY BOARD OF SUPERVISORS *v.* UNITED STATES ET AL.; and

No. A–127. LOUISIANA EX REL. GUSTE, ATTORNEY GENERAL OF LOUISIANA *v.* UNITED STATES ET AL. Applications for stay, presented to JUSTICE WHITE, and by him referred to the Court, granted, and enforcement of the judgment and orders of the United States District Court for the Eastern District Court of Louisiana, Civil Action No. 80–3300, entered August 2, 1988, July 19, 1989, and August 4, 1989, is stayed pending the timely docketing of appeals in these cases and final disposition by the Court. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN dissent.

AUGUST 25, 1989

Miscellaneous Order

No. 88–1000. NEW YORK *v.* HARRIS. Ct. App. N. Y. [Certiorari granted, 490 U. S. 1018.] Barrington D. Parker, Jr.,

Esq., of New York, N. Y., a member of the Bar of this Court, is invited to brief and argue this case as *amicus curiae* in support of the judgment below.

AUGUST 30, 1989

Miscellaneous Orders

No. A–18. POLYAK *v.* STACK ET AL. C. A. 6th Cir. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–47. CITY OF NEW YORK ET AL. *v.* SEAWALL ASSOCIATES ET AL. Ct. App. N. Y. Application for stay, presented to JUSTICE MARSHALL, and by him referred to the Court, denied, and the order heretofore entered by JUSTICE MARSHALL on July 20, 1989, is vacated. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application for stay.

No. A–76 (89–5357). LEBBOS *v.* STATE BAR OF CALIFORNIA ET AL. Ct. App. Cal., 6th App. Dist. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–152. B. J. ALAN CO., INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. Application for stay pending appeal to the United States Court of Appeals for the District of Columbia Circuit, presented to JUSTICE BRENNAN, and by him referred to the Court, denied.

No. 87–1965. ZINERMON ET AL. *v.* BURCH. C. A. 11th Cir. [Certiorari granted, 489 U. S. 1064.] Motion of American Orthopsychiatric Association et al. for leave to file a brief as *amici curiae* granted.

No. 88–854. SPALLONE *v.* UNITED STATES ET AL.;
No. 88–856. CHEMA *v.* UNITED STATES ET AL.; and
No. 88–870. LONGO ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. [Certiorari granted, 489 U. S. 1064.] Motion of petitioner in No. 88–854 for divided argument and for additional time for oral argument denied. Motion of petitioner in No. 88–856 for divided argument and for additional time for oral argument denied. Motion of petitioners in No. 88–870 for divided argument and for additional time for oral argument denied. Motion of respondents Yonkers Branch National Association for the Advancement of Colored People et al. for divided argument and for additional time for oral argument denied.

No. 88–1076. PRESEAULT ET UX. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 2d Cir. [Certiorari granted, 490 U. S. 1034.] Motion of respondents Vermont et al. for divided argument granted.

No. 88–1150. MISSOURI ET AL. *v.* JENKINS ET AL. C. A. 8th Cir. [Certiorari granted, 490 U. S. 1034.] Motion of Icelean Clark et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied.

No. 88–1182. BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES *v.* BOUKNIGHT; and

No. 88–6651. MAURICE M. *v.* BOUKNIGHT. Ct. App. Md. [Certiorari granted, 490 U. S. 1003.] Motion of petitioner Maurice M. for divided argument granted.

No. 88–1198. FEDERAL TRADE COMMISSION *v.* SUPERIOR COURT TRIAL LAWYERS ASSN.; and

No. 88–1393. SUPERIOR COURT TRIAL LAWYERS ASSN. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. D. C. Cir. [Certiorari granted, 490 U. S. 1019.] Motion of respondents/cross-petitioners Superior Court Trial Lawyers Association et al. for divided argument denied.

No. 88–1569. AUSTIN, MICHIGAN SECRETARY OF STATE, ET AL. *v.* MICHIGAN STATE CHAMBER OF COMMERCE. C. A. 6th Cir. [Probable jurisdiction noted, 490 U. S. 1045.] Motion of Federal Election Commission for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 88–1640. MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS ET AL. *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. [Certiorari granted, 490 U. S. 1045.] Motion of the Acting Solicitor General for divided argument denied. JUSTICE WHITE took no part in the consideration or decision of this motion.

Certiorari Denied

No. 89–5476 (A–175). WAYE *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 884 F. 2d 765.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 89–5477 (A–176). WAYE *v.* TOWNLEY, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 884 F. 2d 762.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 86–6023. KUNKLE *v.* TEXAS, *ante*, p. 925;

No. 87–746. MICHAEL H. ET AL. *v.* GERALD D., 491 U. S. 110;

No. 87–1293. BHANDARI *v.* FIRST NATIONAL BANK OF COMMERCE, *ante*, p. 901;

No. 87–1697. WILKINSON *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL., *ante*, p. 408;

No. 87–1711. COUNTY OF YAKIMA ET AL. *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL., *ante*, p. 408;

No. 87–1854. CORY *v.* STANDARD FEDERAL SAVINGS & LOAN ASSN. ET AL., *ante*, p. 918;

No. 87–5666. HIGH *v.* ZANT, WARDEN, *ante*, p. 926;

No. 87–5765. STANFORD *v.* KENTUCKY, *ante*, p. 361;

No. 87–6026. WILKINS *v.* MISSOURI, *ante*, p. 361;

No. 87–6406. WILLIAMS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 925;

No. 87–6997. CARELLA *v.* CALIFORNIA, 491 U. S. 263;

No. 88–226. WARD ET AL. *v.* ROCK AGAINST RACISM, 491 U. S. 781;

No. 88–305. SOUTH CAROLINA *v.* GATHERS, 490 U. S. 805;
No. 88–664. DIAMOND *v.* CHARLES ET AL., *ante*, p. 905;
No. 88–1745. COWHIG *v.* MARSH, SECRETARY OF THE ARMY, *ante*, p. 906;
No. 88–1760. WORRELL *v.* B. F. GOODRICH CO., 491 U. S. 907;
No. 88–1817. BARROW *v.* WAHL ET AL., 491 U. S. 907;
No. 88–1854. DAVENPORT *v.* UNITED STATES, 491 U. S. 907;
No. 88–5189. CREWS *v.* ILLINOIS, *ante*, p. 925;
No. 88–5237. GUERRA *v.* TEXAS, *ante*, p. 925;
No. 88–5437. WILLIAMS *v.* GEORGIA, *ante*, p. 925;
No. 88–5581. POGGI *v.* CALIFORNIA, *ante*, p. 925;
No. 88–6154. BEATY *v.* ARIZONA, 491 U. S. 910;
No. 88–6957. LIGHTSEY *v.* YEAGER, WARDEN, ET AL., *ante*, p. 909;
No. 88–6977. JOHNSON *v.* DEPARTMENT OF JUSTICE, 490 U. S. 1111;
No. 88–7062. BEETS *v.* TEXAS, *ante*, p. 912;
No. 88–7110. PANTOJA *v.* STATEVILLE CORRECTIONAL CENTER ET AL., *ante*, p. 921;
No. 88–7111. BYNUM *v.* WOOD, *ante*, p. 909;
No. 88–7114. MADSEN *v.* MORRELL ET AL., *ante*, p. 909;
No. 88–7116. HART *v.* FRAME ET AL., *ante*, p. 909;
No. 88–7120. HERNANDEZ *v.* CALIFORNIA, 491 U. S. 910;
No. 88–7169. MASON *v.* REES, WARDEN, *ante*, p. 921;
No. 88–7203. SHANNON *v.* O'LEARY, WARDEN, ET AL., *ante*, p. 922;
No. 88–7206. COLEMAN ET AL. *v.* BUTLER, *ante*, p. 922;
No. 88–7331. WILLIAMS *v.* NEW YORK ET AL., *ante*, p. 923;
No. 88–7355. HOLLAND *v.* UNITED STATES, *ante*, p. 924;
No. 88–7394. NGUYEN *v.* OKLAHOMA, *ante*, p. 925;
No. 88–7408. IN RE QUALMAN ET UX., *ante*, p. 916; and
No. 88–7458. DARWALL, AKA FARMER *v.* MICHIGAN ET AL., *ante*, p. 925. Petitions for rehearing denied.

No. 88–309. WYOMING *v.* UNITED STATES ET AL., *ante*, p. 406. Petition for rehearing filed by Wyoming denied. Petition for rehearing filed by respondents Bradford Bath et al. denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

No. 88–5868. BELMONTES *v.* CALIFORNIA, 488 U. S. 1034. Motion for leave to file petition for rehearing denied.

No. 88–6078. BRITZ *v.* ILLINOIS, 489 U. S. 1044 and 490 U. S. 1042. Motion of petitioner for leave to file second petition for rehearing denied.

SEPTEMBER 5, 1989

Dismissals Under Rule 53

No. 89–77. LOUISIANA DOCK CO., INC. *v.* LOGAN. Sup. Ct. La. Certiorari dismissed under this Court's Rule 53. Reported below: 541 So. 2d 182.

No. 88–2063. MINORCO *v.* CONSOLIDATED GOLD FIELDS PLC ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 871 F. 2d 252.

SEPTEMBER 13, 1989

Dismissal Under Rule 53

No. 89–195. MONROE *v.* BUTLER, WARDEN. Crim. Dist. Ct., Parish of Orleans, La. Certiorari dismissed under this Court's Rule 53.

Miscellaneous Order

No. A–159 (89–5221). PASTER *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

SEPTEMBER 21, 1989

Dismissal Under Rule 53

No. 88–2017. M/V LITSA, FKA LAURIE U *v.* SOUTHEASTERN MARITIME CO. ET AL. C. A. 3d Cir. Certiorari dismissed as to Port Stevedoring Co., Inc., and Ryan-Walsh Stevedoring Co., Inc., under this Court's Rule 53. Reported below: 872 F. 2d 554.

SEPTEMBER 25, 1989

Miscellaneous Orders

No. A–58 (88–2010). ROY *v.* UNITED STATES. C. A. 11th Cir. Application to recall and stay the mandate, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. A–85. JOHNSTON ET AL. *v.* SMITH ET AL. Super. Ct. Cal., San Mateo County. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–95 (88–2127). VAHLSING *v.* MAINE. Sup. Jud. Ct. Me. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A–124. ROSENTHAL *v.* ARABIAN ET AL. C. A. 9th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–149 (89–237). PAYNE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 4th Cir. Application for stay of deportation, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D–776. IN RE DISBARMENT OF WERNER. Disbarment entered. [For earlier order herein, see 490 U. S. 1016.]

No. D–779. IN RE DISBARMENT OF LAMPERT. Disbarment entered. [For earlier order herein, see 490 U. S. 1017.]

No. D–789. IN RE DISBARMENT OF GUINAN. Disbarment entered. [For earlier order herein, see 490 U. S. 1079.]

No. D–791. IN RE DISBARMENT OF KROWEN. Disbarment entered. [For earlier order herein, see 490 U. S. 1104.]

No. D–792. IN RE DISBARMENT OF SCHAEFER. Disbarment entered. [For earlier order herein, see 491 U. S. 902.]

No. D–805. IN RE DISBARMENT OF POLLACK. It is ordered that Elliott H. Pollack, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–806. IN RE DISBARMENT OF BIAGGI. It is ordered that Richard Mario Biaggi, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–807. IN RE DISBARMENT OF CALLY. It is ordered that James J. Cally, of Flushing, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–808. IN RE DISBARMENT OF ADDAMS. It is ordered that Nicholas A. Addams, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–809. IN RE DISBARMENT OF EHRLICH. It is ordered that Bernard Gordon Ehrlich, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–810. IN RE DISBARMENT OF SIMON. It is ordered that Stanley Simon, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 87–1955. LEWIS, COMPTROLLER OF THE STATE OF FLORIDA *v.* CONTINENTAL BANK CORP. ET AL. C. A. 11th Cir. [Probable jurisdiction noted, 490 U. S. 1097.] Motion of appellant for divided argument denied.

No. 87–1979. CHESAPEAKE & OHIO RAILWAY CO. *v.* SCHWALB ET AL.; and

No. 88–127. NORFOLK & WESTERN RAILWAY CO. *v.* GOODE. Sup. Ct. Va. [Certiorari granted, 489 U. S. 1009.] Motion of the Solicitor General to permit Christine Desan Husson, Esq., to present oral argument *pro hac vice*, as *amicus curiae*, granted.

No. 87–2048. TEXACO INC. *v.* HASBROUCK, DBA RICK'S TEXACO, ET AL. C. A. 9th Cir. [Certiorari granted, 490 U. S. 1105.] Motions for leave to file briefs as *amici curiae* filed by the following are granted: Motor & Equipment Manufacturers Association, National Association of Wholesaler-Distributors, Boise Cascade Corp., Society of Independent Gasoline Marketers of America et al., National Association of Texaco Wholesalers, American Petroleum Institute et al., Motor Vehicle Manufacturers Association of the United States et al., and Petroleum Marketers Association of America. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–1105. GUIDRY *v.* SHEET METAL WORKERS NATIONAL PENSION FUND ET AL. C. A. 10th Cir. [Certiorari granted, *ante*, p. 904.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied. JUSTICE BLACKMUN would grant the motion.

No. 88–1323. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* EVERHART ET AL. C. A. 10th Cir. [Certiorari granted, 490 U. S. 1080.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 88–1369. MARYLAND *v.* BUIE. Ct. App. Md. [Certiorari granted, 490 U. S. 1097.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–1480. REVES ET AL. *v.* ARTHUR YOUNG & CO. C. A. 8th Cir. [Certiorari granted, 490 U. S. 1105.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–1503. CRUZAN, BY HER PARENTS AND CO-GUARDIANS, CRUZAN ET UX. *v.* DIRECTOR, MISSOURI DEPARTMENT OF HEALTH, ET AL. Sup. Ct. Mo. [Certiorari granted, *ante*, p. 917.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 88–1512. FERENS ET UX. *v.* JOHN DEERE CO. C. A. 3d Cir. [Certiorari granted, 490 U. S. 1064.] Motions of Pfizer,

Inc., and Product Liability Advisory Council for leave to file briefs as *amici curiae* granted.

No. 88–1668. ATLANTIC RICHFIELD CO. *v.* USA PETROLEUM CO. C. A. 9th Cir. [Certiorari granted, 490 U. S. 1097.] Motion of American Newspaper Publishers Association for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–7146. WHITMORE, INDIVIDUALLY AND AS NEXT FRIEND OF SIMMONS *v.* ARKANSAS ET AL. Sup. Ct. Ark. [Certiorari granted, *ante*, p. 917.] Motion of respondents for divided argument and for additional time for oral argument denied.

SEPTEMBER 28, 1989

Miscellaneous Order

No. A–231 (89–5621). GRANT *v.* VASQUEZ, WARDEN. Sup. Ct. Cal. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 943 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

CALIFORNIA *v.* AMERICAN STORES COMPANY ET AL.

ON APPLICATION FOR STAY

No. A–151. Decided August 22, 1989

The request of applicant, the State of California, for a stay of the Court of Appeals' mandate is granted, pending disposition of its petition for a writ of certiorari and conditioned upon the posting of a bond with the Clerk of the District Court. The State, through its attorney general on behalf of himself and as *parens patriae*, filed in the District Court an action as a private plaintiff to enjoin the merger of respondents, the largest and fourth largest retail grocery chains in the State, contending that the merger would lessen competition in the relevant market in violation of the Clayton and Sherman Acts and state law. The court granted the motion for a preliminary injunction and ordered respondents to operate independently and to refrain from merging or integrating their assets and businesses during the pendency of the action. The Court of Appeals remanded, finding, *inter alia*, that the order enjoining respondents from integrating their operations amounted to indirect divestiture, a remedy not available to private plaintiffs under the Clayton Act. However, it granted a stay of its mandate to allow the State to file a petition for a writ of certiorari. The District Court conditioned the stay on the posting of a bond. The State declined to post the bond, and the Court of Appeals vacated its stay and ordered issuance of the mandate. The State has set forth sufficient reasons for granting a stay. It has made an adequate showing of irreparable injury, since other appropriate injunctive relief may be inadequate to remedy the injury. There is also a reasonable probability that the petition will be granted, given the conflict among the lower courts on the important and recurring issue whether divestiture constitutes injunctive relief within the meaning of the Clayton Act and the need for uniform enforcement of federal antitrust laws. Moreover, the fact that the weight of academic authority favors a reading of the Act that would permit divestiture as a remedy in private actions suggests that there is at least a fair prospect that a

majority of the Court will vote to reverse the decision below. Finally, the equities favor the State, since the harm of a substantial lessening of competition in the relevant market outweighs the harm that respondents may suffer as the result of the stay.

JUSTICE O'CONNOR, Circuit Justice.

Applicant, the State of California, requests a stay of the mandate of the judgment of the United States Court of Appeals for the Ninth Circuit, pending disposition of its petition for a writ of certiorari.

Applicant, through its attorney general on behalf of himself and as *parens patriae*, brought the underlying action as a private plaintiff to enjoin the merger of respondent Lucky Stores, Inc., the largest retail grocery chain in California, and respondent American Stores Company, operator of Alpha Beta, the fourth largest retail grocery chain in California.* Applicant contends that the merger would substantially lessen competition in the relevant markets, in violation of § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18, § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, and California's Cartwright Anti-

*American Stores initiated a hostile takeover bid for the Lucky chain on March 21, 1988. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1390, 15 U. S. C. § 18a, American Stores notified the Federal Trade Commission (FTC) of its intentions. On May 23, American Stores increased its tender offer, and Lucky's board of directors approved the merger. On May 31, the FTC filed an administrative complaint alleging violations of § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18, and § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45. The FTC simultaneously proposed a consent order under which it would settle its antitrust complaint in exchange for American Stores' compliance with certain demands, including divestiture of certain supermarkets in northern California and an agreement to "hold separate" the two firms until American Stores satisfied all of the consent order's conditions. American Stores agreed to the consent order, and by June 9 completed its $2.5 billion acquisition of the outstanding Lucky stock. On August 31, the FTC gave final approval to the proposed consent order without modification. On September 1, applicant initiated the underlying action.

trust and Unfair Competition Acts, Cal. Bus. & Prof. Code Ann. §§ 16700–16761 and 17200–17208 (West 1987 and Supp. 1989).

The District Court granted applicant's motion for a preliminary injunction and ordered respondents to operate the two companies independently and refrain from merging or integrating their assets and businesses during the pendency of the action. 697 F. Supp. 1125 (CD Cal. 1988). The court concluded:

> "The overwhelming statistical evidence has demonstrated a strong probability that the proposed merger will substantially lessen competition in violation of Section 7 of the Clayton Act. This showing has not been rebutted by clear evidence that the proposed merger will not, in fact, substantially lessen competition. . . . [U]nless defendants are enjoined, the citizens of California will be substantially and irreparably harmed. While the Court in no way belittles the harm defendants may suffer as a result of this preliminary injunction, the Court concludes that it is substantially less than the harm plaintiff would suffer if the merger is not enjoined." *Id.*, at 1135.

The Court of Appeals for the Ninth Circuit affirmed in part and reversed and remanded in part. 872 F. 2d 837 (1989). The Court of Appeals affirmed the District Court's finding that applicant had shown a likelihood of success on the merits and the possibility of irreparable harm. *Id.*, at 844. The Court of Appeals found, however, that the remedy ordered by the District Court amounted to indirect divestiture, which, the Court of Appeals held, was not a remedy available to private plaintiffs under § 16 of the Clayton Act, 38 Stat. 737, as amended, 15 U. S. C. § 26. 872 F. 2d, at 844–846. Accordingly, the Court of Appeals remanded the case, concluding that the District Court's order enjoining respondents from integrating their operations was overly broad and thus an abuse of discretion. *Id.*, at 845–846.

The Court of Appeals denied applicant's petition for rehearing and rehearing en banc, but granted a stay of its mandate for 30 days to enable applicant to file a petition for a writ of certiorari with this Court. The Court of Appeals also partially remanded the case to the District Court to determine whether, pursuant to Federal Rule of Appellate Procedure 41(b), a bond or other security or condition should be required of applicant as a condition of the stay. The District Court ordered applicant to post an initial bond of $16,288,898 to protect respondents against potential financial losses as a result of the stay of mandate. Applicant, claiming budgetary and administrative impossibility, declined to post the bond and appealed the bond order. The Court of Appeals consequently vacated its stay and ordered issuance of the mandate.

In its application for a stay of the mandate pending this Court's disposition of its petition for certiorari, applicant contends that the Court of Appeals' bond requirement amounts to a denial of a stay and will result in irreparable harm to the State's consumers because of the merger's anticompetitive effects. Applicant also maintains that there is both a reasonable probability that its petition for a writ of certiorari will be granted, because the case presents an issue of great importance on which there is a conflict among the Circuits, and a fair prospect that applicant will prevail on the merits. Finally, applicant asserts that the equities justify a stay of the Court of Appeals' mandate.

I am persuaded that applicant has set forth sufficient reasons for granting a stay in this case. I agree with both the District Court and the Court of Appeals that applicant has made an adequate showing of irreparable injury. See 872 F. 2d, at 844 (lessening of competition "is precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent") (citations omitted); 697 F. Supp., at 1134. Even if applicant is free to seek

other appropriate injunctive relief on remand, the possibility of irreparable injury, it seems to me, remains to the extent that such other relief would be inadequate to remedy the injury. Cf. 2 P. Areeda & D. Turner, Antitrust Law § 328b, p. 137 (1978) ("[D]ivestiture is the normal and usual remedy against an unlawful merger, whether sued by the government or by a private plaintiff").

Moreover, the issue presented appears to be an important question of federal law over which the Circuits are in conflict. Section 16 of the Clayton Act provides in relevant part that "[a]ny person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." 15 U. S. C. § 26. The Court of Appeals, relying on Circuit precedent, held that divestiture, whether direct or indirect, did not constitute "injunctive relief" within the meaning of § 16. See 872 F. 2d, at 844–846 (citing *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 518 F. 2d 913, 920 (CA9 1975)); accord, *Arthur S. Langenderfer, Inc.* v. *S. E. Johnson Co.*, 729 F. 2d 1050, 1060 (CA6), cert. denied, 469 U. S. 1036 (1984). As applicant notes, however, the Court of Appeals for the First Circuit has ruled that divestiture is a remedy available to private plaintiffs under § 16 in appropriate circumstances. *Compania Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F. 2d 404, 413–430 (1985); see also *NBO Industries Treadway Cos.* v. *Brunswick Corp.*, 523 F. 2d 262, 278–279 (CA3 1975) (dictum), vacated on other grounds, 429 U. S. 477 (1977). A number of District Courts have also reached the same conclusion. See, *e. g.*, *Tasty Baking Co.* v. *Ralston Purina, Inc.*, 653 F. Supp. 1250, 1255–1256 (ED Pa. 1987); *Julius Nasso Concrete Corp.* v. *Dic Concrete Corp.*, 467 F. Supp. 1016, 1024–1025 (SDNY 1979); *Credit Bureau Reports,*

Inc. v. *Retail Credit Co.*, 358 F. Supp. 780, 797 (SD Tex. 1971), aff'd, 476 F. 2d 989 (CA5 1973); *Bay Guardian Co.* v. *Chronicle Publishing Co.*, 340 F. Supp. 76, 81–82 (ND Cal. 1972). Given the conflict among the lower courts on this important and recurring issue and the need for uniform enforcement of federal antitrust laws, I think it fair to say that there is a reasonable probability that the petition for a writ of certiorari will be granted in this case.

Indeed, the weight of academic commentary favors a reading of § 16 that would permit divestiture as a remedy in private actions. See, *e. g.*, 2 P. Areeda & D. Turner, Antitrust Law § 328b, p. 137 (1978) ("[D]ivestiture is available in a private suit challenging unlawful mergers"); P. Areeda & H. Hovenkamp, Antitrust Law § 328b, pp. 290–291 (Supp. 1988) (approving *Petrolera*, *supra*); E. Kintner, Primer on the Law of Mergers 361–364 (1973) (divestiture is available in private actions under § 16); L. Sullivan, Law of Antitrust § 216, p. 672, n. 3 (1977) (same); Kintner & Wilberding, Enforcement of the Merger Laws by Private Party Litigation, 47 Ind. L. J. 293 (1972); Peacock, Private Divestiture Suits Under Section 16 of the Clayton Act, 48 Texas L. Rev. 54 (1969); Comment, Private Divestiture: Antitrust's Latest Problem Child, 41 Ford. L. Rev. 569 (1973); Note, The Use of Divestiture in Private Antitrust Suits, 43 Geo. Wash. L. Rev. 261 (1974); Note, Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act, 49 Minn. L. Rev. 267 (1965); Comment, Section 16 of the Clayton Act: Divestiture an Intended Type of Injunctive Relief, 19 Pac. L. J. 143 (1987). Although I cannot, of course, predict with mathematical certainty my colleagues' views on the subject, see *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 434 U. S. 1345, 1347 (1977) (REHNQUIST, J., in chambers), this commentary suggests to me that plausible arguments exist for reversing the decision below and that there is at least a fair prospect that a majority of the Court may vote to do so. Cf. *Zenith Radio Corp.* v. *Hazeltine Re-*

search, Inc., 395 U. S. 100, 130–131 (1969) ("Section 16 should be construed and applied . . . with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' . . . Its availability should be 'conditioned by the necessities of the public interest which Congress has sought to protect'") (citation omitted).

Finally, balancing the stay equities persuades me that the harm to applicant if the stay is denied, in the form of a substantial lessening of competition in the relevant market, outweighs the harm respondents may suffer as a result of a stay of the mandate. Applicant alleges, for example, that permitting the merger would cost the State's consumers $400 million a year in higher prices. Respondents contend that they are incurring costs of over $1 million a week by reason of the District Court's injunction and applicant's decision to file suit after the merger had been consummated. To be sure, the cost of enjoining a merger before consummation is staggering, see *Western Airlines, Inc.* v. *Teamsters*, 480 U. S. 1301, 1309 (1987) (O'CONNOR, J., in chambers), and the cost of enjoining an already completed transaction even greater. But, as the District Court found, "the State conducted [its] investigation as swiftly as was responsibly possible." 697 F. Supp., at 1135. Under the circumstances, and in light of the public interests involved, it appears that the equities favor applicant.

Because the citizens of California will likely suffer irreparable harm if integration of respondents' companies is not enjoined, and because there is both a reasonable probability that at least four Justices will vote to grant the petition for a writ of certiorari and a fair prospect that applicant may prevail on the merits, I grant the requested stay of the mandate of the United States Court of Appeals for the Ninth Circuit in this case, pending the disposition by this Court of the petition for a writ of certiorari or further order of this Court.

This order is conditioned upon the posting of a good and sufficient bond with the Clerk of the United States District Court for the Central District of California, the adequacy of such bond to be determined by that court.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1986, 1987 AND 1988

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	1986	1987	1988	1986	1987	1988	1986	1987	1988	1986	1987	1988
Number of cases on dockets	12	16	14	2,547	2,577	2,587	2,575	2,675	3,056	5,134	5,268	5,657
Number disposed of during term	1	5	2	2,105	2,131	2,203	2,254	2,251	2,625	4,360	4,387	4,830
Number remaining on dockets	11	11	12	442	446	384	321	424	431	774	881	827

	TERMS		
	1986	1987	1988
Cases argued during term	175	167	170
Number disposed of by full opinions	164	151	156
Number disposed of by per curiam opinions	10	9	12
Number set for reargument	1	7	2
Cases granted review this term	167	180	147
Cases reviewed and decided without oral argument	113	95	108
Total cases to be available for argument at outset of following term	91	105	81

JULY 3, 1989

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CONSTITUTIONAL LAW—Continued.

encourage or counsel a woman to have a nontherapeutic abortion is moot, since appellees contend that, given State's interpretation of provision, they are not adversely affected by it; Court of Appeals' decision that provision requiring a physician to determine if an unborn child is viable before he can perform an abortion on a woman whom he believes is carrying an unborn child of 20 or more weeks gestation violates *Roe* v. *Wade*, 410 U. S. 113, and subsequent cases, is reversed. Webster v. Reproductive Health Services, p. 490.

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X. States' Immunity from Suit.

Bankruptcy Code—Monetary recovery.—Court of Appeals' judgment that plain language of § 106(c) of Bankruptcy Code abrogates sovereign immunity only to extent necessary to determine a State's rights in debtor's estate and does not abrogate such immunity from recovery of an avoided preferential transfer of money or from a turnover proceeding, is affirmed. Hoffman v. Connecticut Dept. of Income Maintenance, p. 96.

CRECHE DISPLAYED ON PUBLIC PROPERTY. See **Constitutional Law**, III.

CRIMINAL LAW. See **Constitutional Law**, I, II, VI, VIII; **Habeas Corpus; Racketeer Influenced and Corrupt Organizations Act.**

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1. *Supreme Court—Question properly presented for review—Punitive damages as excessive under Due Process Clause.*—Supreme Court declines to consider whether punitive damages awards in cases between private parties may be excessive under Due Process Clause of Fourteenth Amendment, since question was not raised in courts below. Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., p. 257.

2. *Supreme Court—Question properly presented for review—Request for jury trial.*—Where issue was not raised below, Court declines to address respondent's contention that petitioner Granfinanciera was a commercial instrumentality of Colombian Government when it made its request for a jury trial below and was therefore not entitled to such a trial under Seventh Amendment or statutory provisions. Granfinanciera, S. A. v. Nordberg, p. 33.

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Term statistics, p. 1309.

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"Agency records." Freedom of Information Act, 5 U. S. C. § 552(a)(4)(B). Department of Justice v. Tax Analysts, p. 136.

ZONING.

Tribal authority over nonmembers' land.—Court of Appeals' ruling that Tribe has authority to zone fee lands owned by nonmembers and located in areas of reservation closed to general public, is affirmed, but court's holding that Tribe has authority to zone nonmembers' land located in areas open to public, is reversed. Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, p. 408.

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